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SOUTHERN DISTRICT OF CALIFORNIA

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DEPUTY

Atorneys for Plaintiff, CATLIN UNDERWRITING AGENCIES LIMITED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
'08 CV 0173WQHJMA
WRITING } Case No.:
ITED, }
COMPLAINT FOR DAMAGES

CATLIN UNDERWRITING AGENCIES LIMITED,

Case No.:

COMPLAINT FOR DAMAGES

Plaintiff,

SAN DIEGO REFRIGERATED
SERVICES, INC. D/B/A
HARBORSIDE D/B/A SAN DIEGO
TERMINALS, PLA-ART
INTERNATIONAL D/B/A SAN
DIEGO COLD STORAGE, SAN
DIEGO COLD STORAGE, INC.,
MIGUEL CUEVA A/K/A MIGUEL
TAMAYO, SERGIO HERNANDEZ,
MARCUS FOODS, INC., and DOES 1
to 100, Inclusive,

Defendants.

PLAINTIFFS' COMPLAINT AT LAW

Catlin Underwriting Agencies Limited (“Catlin”), for its Complaint against San Diego Refrigerated Services, Inc. d/b/a Harborside d/b/a San Diego Terminals, PLA-ART International d/b/a San Diego Cold Storage, San Diego Cold Storage,

1 Inc., Miguel Cueva a/k/a Miguel Tamayo, Sergio Hernandez, Unknown Defendants
2 DOE 1-100, and Marcus Foods, Inc., states as follows.

3 **NATURE OF DISPUTE**

4 1. This is an insurance coverage dispute arising out of an insurance policy
5 referenced by certificate number LON7081-05 (the "Policy") subscribed to by
6 Catlin and issued to San Diego Refrigerated Services, Inc. d/b/a Harborside d/b/a
7 San Diego Terminals and PLA-ART International d/b/a San Diego Cold Storage.

8 **PARTIES**

9 2. Catlin is and at all times relevant hereto was organized under the laws
10 of the United Kingdom with its principal place of business in London, England.
11 Catlin was authorized to do business and was actually doing business at all relevant
12 times in California.

13 3. Upon information and belief, Defendants San Diego Refrigerated
14 Services, Inc. d/b/a Harborside d/b/a San Diego Terminals is a corporation with its
15 principal place of business in California. San Diego Refrigerated Services, Inc.
16 d/b/a Harborside d/b/a San Diego Terminals is engaged in the business of operating
17 cold storage warehouse facilities.

18 4. Upon information and belief, PLA-ART International d/b/a San Diego
19 Cold Storage is a corporation with its principal place of business in California.
20 PLA-ART International d/b/a San Diego Cold Storage is engaged in the business of
21 operating cold storage warehouse facilities.

22 5. Upon information and belief, San Diego Cold Storage, Inc. is an alias
23 of San Diego Refrigerated Services, Inc. d/b/a Harborside d/b/a San Diego
24 Terminals and/or PLA-ART International d/b/a San Diego Cold Storage.

25 6. Upon information and belief, Miguel Cueva a/k/a Miguel Tamayo is a
26 resident of California.

27 7. Upon information and belief, Sergio Hernandez is a resident of
28 California.

8. Upon information and belief, Marcus Foods, Inc. (hereinafter "Marcus Foods") is a corporation organized under the laws of California with its principal place of business in California.

JURISDICTION AND VENUE

9. This court has subject matter jurisdiction over this matter based on diversity of citizenship between Catlin and Defendants, pursuant to 28 USC § 1332(a)(2).

10. The amount in controversy in this action exceeds \$75,000, exclusive of interest and costs.

11. Venue is proper pursuant to 28 U.S.C. § 1391(a)(1) and (2) because San Diego Refrigerated Services, Inc. d/b/a Harborside d/b/a San Diego Terminals and PLA-ART International d/b/a San Diego Cold Storage reside in this judicial district and a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

FACTUAL ALLEGATIONS

A. INSURANCE POLICY

12. Catlin is a subscriber to a policy of insurance referenced by certificate number LON7081-05, with a “Named **Insured**” identified, among others, as PLART International d/b/a San Diego Cold and a policy period from January 1, 2006 to January 1, 2007 (the “Policy”). A true and accurate copy of the Policy is attached and incorporated herein as **Exhibit A**.

13. The Policy has limits of liability of \$3.5 million and a deductible of \$10,000 “per occurrence.”

14. The Policy provides "warehouseman's legal liability coverage" as follows:

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WAREHOUSEMAN'S LEGAL LIABILITY COVERAGE

A. COVERAGES

In consideration of premium charges hereinafter provided and subject to the following terms, conditions, exclusions, and limitations, this **Company** agrees:

1. a. To pay on behalf of the **Insured** those sums that the **Insured** becomes legally obligated to pay for **Property Damage** by reason of liability imposed upon the **Insured** as a warehouse operator or bailee resulting from an **occurrence** during the Certificate period.
2. a. We may, at our discretion, investigate any **occurrence** and settle any claim or suit that may result, but the amount we will pay for damages, is limited as described in section C. Limits of Liability.
- b. The **Company** has the right and duty, to defend any suit or other proceedings which may be brought against the **Insured** to enforce claims, even if such suits or proceedings are groundless, false or fraudulent. But:

(4) **Company** has no duty to defend the **Insured** against any suit or other proceedings seeking damages to which this insurance policy does not apply.

c. We will pay, irrespective of the Company's "Limit(s) of Liability" otherwise specified herein:

(2) all expenses of litigation and all costs taxed against the **Insured** in proceedings defended by the **Company**.

F. DEFINITIONS

1. The unqualified word "**Insured**" includes the Named **Insured** and also includes any executive officer, director, employee, or stockholder thereof while acting within the scope of his/her duties as such, and if the Named **Insured** is a partnership, the unqualified word "**Insured**" also includes any partner therein but only with respect to his/her liability as such. However, as respects Notice of Cancellation, it will only be necessary for this **Company** to send such notice to the Named **Insured** as stated in this Insurance.

* * *

1 3. **“Property Damage”** means physical loss, damage or
 2 destruction to tangible, personal **Property Damage** owned by
 3 others in the care, custody or control of the **Insured** while on the
 4 Premises of the **Insured** and includes loss of use of such
 5 **Property Damage**. **Property Damage** includes the
 6 reasonable and necessary costs incurred to remove the debris of
 7 such **Property Damage** after an **Occurrence**. **Property**
 8 **Damage** includes actual loss of profits not to exceed those
 9 profits, which would have been realized from the sale of the lost,
 10 damaged or destroyed **Property Damage**. **Property Damage**
 11 Damage does not include any other consequential damages
 12 including, but not limited to, personal injury, other profit losses,
 13 or damage to reputation or goodwill.

14 4. The term “**Occurrence**” wherever employed in this
 15 Insurance, is defined as (1) an accident that takes place during
 16 the period of insurance under this Certificate, or (2) in the
 17 absence thereof, a continuous or repeated exposure to conditions
 18 which unexpectedly cause loss or destruction of or damage to
 19 tangible **Property Damage** during the period of insurance under
 20 this Certificate, and all such exposure to substantially the same
 21 general conditions existing at or emanating from any one
 22 Premises specified in the Supplemental Declarations shall be
 23 deemed one **Occurrence**.

14 15. The Policy defines the words “we,” “us,” and “our” as the “Company”
 15 (Catlin) and the words “you” and “your” as the “Named **Insured**.” The
 16 “Company” is Underwriters.

17 16. The Policy defines “**Premises**” as the building located at the address
 18 shown in the Supplemental Declarations, which is occupied by the “**Insured**” as a
 19 public warehouse. Here, the Schedule of Covered **Premises** lists the location as
 20 1240 West 28th Street, National City, California 91950-6319.

21 17. The Policy’s Section G, Loss Conditions, Paragraph 1, Duties In The
 22 Event Of Accidents, Claim, Or Suit, provides:

23 a. The **Insured**, upon knowledge of a claim or of any
 24 **Occurrence** which may give rise to a claim, shall give
 25 written notice thereof, with the most complete information
 26 obtainable, to the **Company** or its authorized agent, as soon
 27 as practicable. If such **Occurrence** involves a violation of
 28 law, immediate notice thereof shall be given by the **Insured**
 29 to the public police or other peace authorities having
 30 jurisdiction. If claim is made or suit is brought against the
 31 **Insured**, the **Insured** shall immediately forward to the
 32 **Company** or its authorized agent every demand, notice,

summons, or other process received by him or his representative.

B. RELEASE OF MARCUS FOODS PRODUCT

18. In 2006, Marcus Foods stored its food product with San Diego Refrigerated Services, Inc. d/b/a Harborside d/b/a San Diego Terminals, PLA-ART International d/b/a San Diego Cold Storage, and/or San Diego Cold Storage, Inc. (hereinafter, collectively “San Diego”) at San Diego’s warehouse facility at 1240 West 128th Street, National City, California.

19. In and around August 2006, Marcus Foods suspected that its product stored at San Diego's warehouse facility above had been allegedly released and/or was being released without Marcus Foods' authorization, consent, or knowledge.

20. Specifically, Marcus Foods believed that more product was being allegedly released to its customers than it authorized, and that said product was being allegedly released without any paperwork received or generated by San Diego.

21. In and around August 2006, Marcus Foods asked San Diego for a physical inventory count of Marcus Foods product stored at San Diego's warehouse facility above.

22. San Diego complied with Marcus Foods' request for a physical inventory count, and a physical inventory count of Marcus Foods product stored at San Diego's warehouse facility above was conducted.

23. In and around August 2006, Marcus Foods informed San Diego that San Diego had allegedly released and/or was releasing Marcus Foods product from San Diego's warehouse without Marcus Foods' authorization, consent, or knowledge.

24. At that time, Marcus Foods informed San Diego that San Diego had allegedly released and/or was releasing more product to Marcus Foods customers than was authorized by Marcus Foods.

1 25. One of these Marcus Foods customers was Del Rancho Foods.

2 26. On August 8, 2006, Marcus Foods and Del Rancho Foods entered into
3 a Memo of Understanding ("Memo"). A true and accurate copy of the Memo is
4 attached and incorporated herein as **Exhibit B**.

5 27. The Memo provided that:

6 I, Alberto Sanchez, owner of Del Rancho Foods, agree to
7 the following terms of my meeting with Jerry Marcus,
August 8, 2006 at Marcus Food **Company**, Inc.

8 1. I will have my accountants call Jerry tomorrow, August
9 9, to discuss the viability and profitability of Del Rancho
Foods.

10 2. I will send weekly to Jerry my P&L statement for the
11 previous week. In addition, I will send my balance sheet
monthly. I will apprise Marcus Food **Company**, Inc. of
12 my receivables, and make them aware of any problem
areas, on a timely basis,

13 3. I will allow Marcus Food **Company**, Inc. to file UCC
14 filings on my real business **Property Damage**, inventory,
15 and equipment.

16 4. I am assuming debt of approximately \$479,000
17 comprised of the following

18 a. Approximately \$156,000 of current receivables
19 due Marcus Food **Company**, Inc.

20 b. Approximately \$143,000 of products delivered to
21 me by Sergio Hernandez that was not invoiced by Marcus
22 Food **Company**, Inc.

23 c. Approximately \$80,000 of outstanding
24 receivables to Henry Hernandez

25 d. \$100,000 of misappropriated funds by Sergio
Hernandez from Henry Hernandez.

26 28. In September 2006, San Diego had knowledge of the Memo.

27 29. On September 6, 2006 at 2:19 p.m., San Diego faxed the Memo to
28 "Harborside."

29 30. In or around September 2006, Marcus Foods made a claim against San
30 Diego for loss it purportedly suffered arising out of the alleged unauthorized release
of Marcus Foods product to Del Rancho Foods, among others.

31. At that time and shortly thereafter, Marcus Foods made a \$125,000
32 demand against San Diego for loss it purportedly suffered arising out of the alleged
33 unauthorized release of Marcus Foods product to Del Rancho Foods, among others.

1 32. During this time and shortly thereafter, San Diego negotiated with
2 Marcus Foods concerning the above purported loss and Marcus Foods' resultant
3 claim against it.

4 33. In December 2006, San Diego continued to negotiate with Marcus
5 Foods concerning the above purported loss and Marcus Foods' resultant claim
6 against it.

7 34. Specifically, in response to Marcus Foods' \$125,000 demand against it,
8 San Diego made a counteroffer of \$50,000.

9 35. San Diego later retracted this counteroffer.

10 36. Through March 2007, San Diego continued to negotiate with Marcus
11 Foods concerning the above purported loss and Marcus Foods' resultant claim
12 against it.

13 37. Throughout this time, the Marcus Foods product that was allegedly
14 released without authorization was readily traceable. Accordingly, at that time, the
15 product could have been recovered in whole or in part and/or Marcus Foods'
16 purported loss and claim substantially mitigated.

17 **C. MARCUS FOOD COMPLAINT**

18 38. On May 5, 2007 Marcus Foods filed a complaint against San Diego
19 Cold Storage, Inc., Miguel Cueva and/or Miguel Tamayo, Sergio Hernandez, and
20 unknown defendants DOE 1-100 styled *Marcus Foods v. San Diego Cold Storage,*
21 *Inc., Miguel Cueva, Sergio Hernandez and DOES 1-10*, in the Superior Court of
22 California, County of San Diego No. 37-200700066571-CU-CO-CTL (the "Marcus
23 Foods Complaint"). A true and accurate copy of this letter is attached and
24 incorporated herein as **Exhibit C**.

25 39. The Marcus Foods Complaint alleges that San Diego Cold Storage,
26 Inc., Miguel Cueva and/or Tamayo, Sergio Hernandez and DOE 1-100 (collectively,
27 the "Marcus Foods Defendants") agreed, conspired, planned and engaged in the
28 release and sale of Marcus Foods goods and food-products without the knowledge,

1 authorization, or consent of Marcus Foods, and as a result, San Diego Cold Storage,
 2 Inc. allegedly breached its contract with Marcus Foods, and Marcus Foods
 3 Defendants allegedly converted the product for their own use.

4 40. The Marcus Foods Complaint alleges in relevant part that:

5 3. * * * SAN DIEGO COLD STORAGE is engaged in the
 6 business of providing warehouse and cold-storage facilities
 7 for hire, pursuant to California Commercial Code
 8 §7102(1)(h). The DEFENDANT'S SAN DIEGO COLD
 9 STORAGE facility is located at 1240 West 28th Street, in
 10 National City, California.

11 4. * * * DEFENDANT MIGUEL CUEVA is employed by
 12 DEFENDANT SAN DIEGO COLD STORAGE as the
 13 foreman of the SAN DIEGO COLD STORAGE facility
 14 located at 1240 West 28th Street, in National City, California.

15 5. * * * DEFENDANT SERGIO HERNANDEZ is an
 16 independent and self-employed sales-agent engaged in the
 17 business at DEFENDANT SAN DIEGO COLD
 18 STORAGE'S facility located at 1240 West 28th Street, in
 19 National City, California.

20 6. PLAINTIFF does not know the true names or capacities of
 21 those DEFENDANTS named herein as DOES 1 through 100.
 22 PLAINTIFF will amend this Complaint to allege their true
 23 names and capacities when the same have been ascertained,
 24 or according to proof at the time of trial.

25 7. * * * fictitiously named DEFENDANT is responsible in some
 26 manner for the acts and/or occurrences alleged hereafter, and
 27 that each DEFENDANT was authorized and/or empowered
 28 by the remaining DEFENDANTS in that PLAINTIFF'S
 losses as herein alleged were proximately caused by their acts
 and/or omissions. At all time relevant herein, each
 DEFENDANT was the agent and/or employee of each of the
 other DEFENDANTS and was at all times relevant herein
 acting within the purpose and scope of such agency and/or
 employment. At all times herein below, unless otherwise
 specified, DEFENDANTS SAN DIEGO COLD STORAGE,
 MIGUEL TAMAYO, SERGIO HERNANDEZ and Does 1
 through 100, inclusive, will be referred to collectively as
 "DEFENDANTS" in the balance of the Complaint for
 Damages.

25 * * *

26 STATEMENT OF FACTS

27 8. On or about June of 2005 PLAINTIFF MARCUS FOODS
 28 and DEFENDANT SAN DIEGO COLD STORAGE entered
 into a written agreement (hereinafter the "CONTRACT")

wherein DEFENDANT SAN DIEGO COLD STORAGE agreed to provide PLAINTIFF MARCUS FOODS with warehouse and cold-storage facilities for hire. The CONTRACT specifically provides for the transfer of PLAINTIFF MARCUS FOODS goods and products to DEFENDANT SAN DIEGO COLD STORAGE'S warehouse for storage and release of said products only to those MARCUS FOODS customers as PLAINTIFF MARCUS FOODS would direct.

* * *

10. At the time of each PLAINTIFF'S delivery of said goods and food-products, a warehouse receipt was issued by DEFENDANT SAN DIEGO COLD STORAGE to PLAINTIFF MARCUS FOODS therefore. In return for valuable consideration paid by PLAINTIFF MARCUS FOODS, DEFENDANT SAN DIEGO COLD STORAGE accepted each of PLAINTIFF'S goods and food-products, and agreed to the storage and release of PLAINTIFF'S goods and food-products only to those MARCUS FOODS customers as PLAINTIFF MARCUS FOODS would direct.
11. In approximately February of 2006 and continuing for several months thereafter, DEFENDANTS and each of them agreed, conspired, planned and engaged in the release of and sale to third parties of PLAINTIFF'S goods and food-products without the knowledge, authorization or consent of PLAINTIFF MARCUS FOODS.
12. In approximately August 2006, PLAINTIFF MARCUS FOODS discovered the ongoing and unauthorized release of and sale to third parties of PLAINTIFF'S goods and food-products by the DEFENDANTS and each of them. The unauthorized release of PLAINTIFF'S goods and food-products by the DEFENDANTS was thereafter confirmed by DEFENDANT SAN DIEGO COLD STORAGE in August 2006.

* * *

FIRST CAUSE OF ACTION
(Breach of Contract - -Against San Diego Cold Storage)

13. PLAINTIFF MARCUS FOODS re-alleges and incorporates by reference paragraphs 1 through 12, inclusive, as though fully set forth herein.

* * *

16. PLAINTIFF MARCUS FOODS has demanded that DEFENDANT SAN DIEGO COLD STORAGE return said food products to PLAINTIFF, but DEFENDANT SAN DIEGO COLD STORAGE has failed and refused, and continues to fail and refuse to return PLAINTIFF'S goods and food-products.

1 * * *

2 **SECOND CAUSE OF ACTION**
3 (Conversion – Against All Defendants)4
5 18. PLAINTIFF MARCUS FOODS re-alleges and incorporates
6 by reference paragraphs 1 through 17, inclusive, as though
7 fully set forth herein.
8
9 19. By its wrongful release of, possession of, and exercise of
10 dominion and control over PLAINTIFF'S goods and food-
11 products, DEFENDANTS and each of them converted the
12 PLAINTIFF'S goods and food-products to and for their own
13 use. The DEFENDANTS and each of them exercised
14 possession and control of PLAINTIFF'S goods and food-
15 products and at all relevant times therein, had the power to
16 sell to third parties the PLAINTIFF'S goods and food-
17 products without PLAINTIFF MARCUS FOODS'
18 authorization or consent.
19

20 * * *

21 WHEREFORE, PLAINTIFF MARCUS FOODS prays for judgment
22 against DEFENDANT, and each of the, as follows:23
24 1. Compensatory damages in an amount according to proof;
25 2. Consequential damages reasonably foreseeable as a result
26 of the DEFENDANT'S ACTS AND/OR OMISSIONS.
27 3. Punitive Damages, as to the Second Cause of Action only,
28 to punish and deter the DEFENDANTS from future and
29 further actions as described therein;
30 4. Attorneys Fees and Costs of Suit as provided by law; and
31 5. For such other relief as the Court shall deem just and
32 proper.33
34 41. Exhibit B of the Marcus Foods Complaint is an "Inventory of Missing
35 Product," identifying the particular goods allegedly missing (the subject of the
36 complaint) and totaling \$129,812.90.37
38 42. Shortly after the Marcus Foods Complaint was served, San Diego
39 tendered defense of the complaint to Catlin.40
41 43. After the filing of the Marcus Foods Complaint in May 2007, San
42 Diego notified Catlin for the first time of (1) the events and/or conduct surrounding
43 the alleged unauthorized release of Marcus Foods product in 2006, (2) Marcus

1 Foods' purported loss arising out of such alleged unauthorized release of product,
2 and (3) Marcus Foods' claim against San Diego for such purported loss.

3 44. San Diego waited approximately ten months from August or September
4 2006 until after the filing of the Marcus Foods Complaint in May 2007 to notify
5 Catlin of information it possessed in August or September 2006 that (1) the events
6 and/or conduct surrounding the alleged unauthorized release of Marcus Foods
7 product in 2006, (2) Marcus Foods' purported loss arising out of such alleged
8 unauthorized release of product, and (3) Marcus Foods' claim against San Diego for
9 such purported loss.

10 45. The Marcus Foods Complaint was Catlin's first notice of events and/or
11 conduct surrounding the alleged unauthorized release of Marcus Foods product in
12 2006, the allegations in the Marcus Foods Complaint, and Marcus Foods' claim
13 against San Diego.

14 46. On July 25, 2007, Catlin issued a letter declining San Diego's tender of
15 defense. A true and accurate copy of this letter is attached and incorporated herein
16 as **Exhibit D**.

17 **COUNT I**

18 **(IN THE ALTERNATIVE TO COUNT III)**

19 **DECLARATION OF NO COVERAGE BECAUSE NO OCCURRENCE**

20 47. Catlin incorporate by reference the allegations contained in paragraphs
21 1 through 46 above, as though fully set out herein in this Count I.

22 48. The Marcus Foods Complaint does not allege an "**Occurrence**" under
23 the Policy.

24 49. The Marcus Foods Complaint does not allege conduct that constitutes
25 an "accident" or a "continuous or repeated exposure to conditions which
26 unexpectedly cause loss ***."

27 50. Where the Marcus Foods Complaint alleges that the Marcus Foods
28 Defendants "agreed, conspired, planned and engaged in the release of and sale to

1 third parties of [Marcus Foods goods] without [its] knowledge, authorization or
 2 consent," the complaint alleges that Marcus Foods Defendants' conduct was
 3 deliberate and calculated.

4 51. The Marcus Foods Complaint does not allege exposure to some sort of
 5 physical harm (wind, cold, mold, etc.) that results in **Property Damage** damage.

6 52. At all relevant times herein, Marcus Foods has claimed and is claiming
 7 that San Diego's conduct in releasing more product to Marcus Foods customers than
 8 authorized by Marcus Foods was conduct that was premeditated, deliberate, and
 9 intentional, not inadvertent or negligent.

10 53. There is no duty to defend San Diego under the Policy with respect to
 11 the Marcus Foods Complaint because the Marcus Foods Complaint does not allege
 12 an "**Occurrence**."

13 54. There is no duty to indemnify San Diego under the Policy with respect
 14 to the Marcus Foods Complaint because the Marcus Foods Complaint does not
 15 allege an "**Occurrence**."

16 55. On the above basis, Catlin seeks a declaration that there is no coverage
 17 under the Policy for San Diego with respect to the Marcus Foods Complaint.

18 **COUNT II**

19 **(IN THE ALTERNATIVE TO COUNT III)**

20 **DECLARATION OF NO COVERAGE BECAUSE SAN DIEGO**

21 **ACTED ONLY WILLFULLY**

22 56. Catlin incorporates by reference the allegations contained in paragraphs
 23 1 through 55 above, as though fully set out herein in this Count II.

24 57. § 533 of the Insurance Code of California provides:

25 **§ 533 Willful act of Insured**

26 An insurer is not liable for a loss caused by the willful act of the
 27 **Insured**; but he is not exonerated by the negligence of the
Insured, or of the **Insured**'s agents or others.

58. The Marcus Foods Complaint alleges only willful and intentional conduct.

59. At all relevant times herein, Marcus Foods has claimed and is claiming that San Diego's conduct in releasing more product to Marcus Foods customers than authorized by Marcus Foods was conduct that was willful and intentional, not inadvertent or negligent.

60. On the above basis, Catlin seeks a declaration that there is no coverage under the Policy for San Diego with respect to the Marcus Foods Complaint.

COUNT III

(IN THE ALTERNATIVE TO COUNTS I, II, AND IV)

**DECLARATION OF NO COVERAGE BECAUSE SAN DIEGO BREACHED
ITS DUTIES UNDER THE POLICY'S NOTICE PROVISIONS**

61. Catlin incorporates by response the allegations contained in paragraph 1 through 46 above, as though fully set out herein in this Count III.

62. San Diego breached the Policy's Section G, Loss Conditions, Paragraph 1, Duties In The Event Of Accidents, Claim, Or Suit.

63. San Diego failed to give Catlin written notice as soon as practicable of (1) the events and/or conduct surrounding the alleged unauthorized release of Marcus Foods product in 2006, and (2) Marcus Foods' purported loss arising out of such alleged unauthorized release of product. Moreover, San Diego failed to give Catlin written notice immediately of Marcus Foods' claim against San Diego for such purported loss.

64. San Diego's above failure to give timely notice substantially prejudiced Catlin.

65. Because of San Diego's above failure, Catlin lost the ability to adjust, mitigate, and/or eliminate any liability and/or the amount of the purported loss. Catlin also lost the ability to assist in the potential recovery and/or negotiation of a compromise payment for the released product.

66. As a result of San Diego's above failure, Catlin has suffered actual and substantial prejudice.

67. Catlin has no duty to defend or indemnify San Diego with respect to the Marcus Foods Complaint.

68. On the above basis, Catlin seeks a declaration that San Diego breached its duties under the Policy's notice provision, Catlin was actually and substantially prejudiced as a result, and as such, there is no coverage under the Policy for San Diego with respect to the Marcus Foods Complaint.

COUNT IV

(IN THE ALTERNATIVE TO COUNT III)

**DECLARATION THAT EXCLUSIONS 7, 10, AND 12 EXCLUDE
COVERAGE FOR MARCUS FOODS COMPLAINT**

69. Catlin incorporates by reference the allegations contained in paragraphs 1 through 60 above, as though fully set out herein in this Count IV.

70. The Policy provides the following exclusions under Section B of the Policy that there is no coverage:

* * *

7. For loss, destruction, or damage to **Property Damage** caused by the infidelity or dishonesty of the **Insured** or any person or persons in the employment or service of the **Insured**, whether or not such an act or acts occur during the regular hours of employment or service.

* * *

10. For any unexplained loss of **Property Damage**, and/or any mysterious disappearance of **Property Damage**, and/or any shortage of **Property Damage** provided that such loss, mysterious disappearance and/or shortage is based solely upon a discrepancy between a physical count and a book, computer or other inventory.

* * *

12. For loss, destruction, or damage to **Property Damage** arising out of any processing performed by or on behalf of the **Insured**, unless endorsed herein. This exclusion does not apply to normal handling, freezing, and tempering.

71. The Marcus Foods Complaint alleges that Marcus Foods allegedly suffered loss caused by infidelity or dishonesty of San Diego, its employees, and individuals in San Diego's service.

72. The Marcus Foods Complaint alleges that Marcus Foods allegedly suffered unexplained loss and shortage of product based upon a discrepancy between a physical count and a book, computer or other inventory.

73. The Marcus Foods Complaint alleges that Marcus Foods allegedly suffered loss arising out of any processing performed by or on behalf of San Diego.

74. The above exclusions exclude coverage for San Diego with respect to the Marcus Foods Complaint.

75. Catlin has no duty to defend or indemnify San Diego with respect to the Marcus Foods Complaint.

76. On the above basis, Catlin seeks a declaration that there is no coverage under the Policy for San Diego with respect to the Marcus Foods Complaint.

RELIEF SOUGHT

Plaintiff Catlin respectfully prays for the following relief:

I. That as to Count I, this Court find and declare that the Policy does not provide coverage for San Diego with respect to the Marcus Foods Complaint, as the Marcus Foods Complaint does not allege an "**Occurrence**."

II. That as to Count II, this Court find and declare that the Policy does not provide coverage for San Diego with respect to the Marcus Foods Complaint, as § 533 of the Insurance Code of California applies where Marcus Foods has claimed and is claiming that San Diego's conduct in releasing more product to Marcus Foods customers than authorized by Marcus Foods was conduct that was willful and intentional, not inadvertent or negligent.

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1 III. That as to Count III, this Court find and declare find that that the Policy
2 does not provide coverage for San Diego with respect to the Marcus Foods
3 Complaint, as San Diego breached its duties under the Policy's notice provision, and
4 Catlin was actually and substantially prejudiced as a result.

5 IV. That as to Count IV, this Court find and declare that that the Policy
6 does not provide coverage for San Diego with respect to the Marcus Foods
7 Complaint, as exclusions 7, 10, and 12 apply to exclude coverage in this instance.

8 V. That the Court award further relief as it deems just.

9
10 Dated: January 28, 2008

CHRISTENSEN EHRET LLP

11
12 By: 

13
14 Jack C. Hsu, ESQ.
15 Attorneys for Plaintiff, CATLIN
16 UNDERWRITING AGENCIES LIMITED

17 CHRISTENSEN EHRET LLP

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Previous No. LON7081-04	Contract Ref. No LC0514907	Certificate No LON7081-05
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1. Named Insured and Mailing Address

San Diego Refrigerated Services, Inc.
 dba Harborside dba San Diego Terminals
 PLA-Art International dba San Diego Cold
 Otay Mesa Maintenance & Repair
 Central California Warehousing Services, Inc. aka CCWS
 Edward Plant
 Frank Plant
 PO Box 85001
 San Diego, CA 92186-5001

2. Effective from 1/1/2006 TO 1/1/2007
 both days at 12.01 a.m. local standard time

3. Insurance is effective with 100% CERTAIN LLOYDS UNDERWRITERS

4. Coverage

Insurance applies only for coverages shown below. The limits of insurance and deductibles for each coverage shown below are per the applicable supplemental declarations attached.

Coverage Forms

Warehouseman's Legal Liability Coverage

5. Special Conditions or Non-Standard Endorsements (copies attached)

Common Inland Marine Policy Conditions
 Institute Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic
 Weapons Exclusion Clause CL 370 dated 10.11.2003 as amended by the Radioactive Contamination
 Exclusion Clause (USA Endorsement) dated 11 October 2003
 Institute Service of Suit Clause (U.S.A.) CL 355 dated 1.11.92
 Several Liability Notice LSW 1001 (Insurance)

6. Premium for all Coverage parts

Total Premium:	\$31,481.00
CA Surplus Lines Tax	\$944.43
CA Surplus Lines Stamping Fee	\$70.83



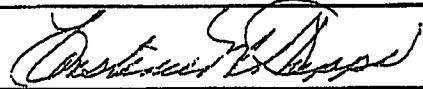
Service of Suit may be made upon:

7. LeBoeuf, Lamb, Greene and McRae
1025 55th St
New York, NY 10019-5389
USA

Dated:

1/1/2006

By:



COVERHOLDER

Warehouseman's Legal Liability**Attaching to and forming part of Certificate no. LON7081-05**

The following is added to the Declarations Page and applies to the Warehouseman's Legal Liability Coverage Form.

1. Named Insured

San Diego Refrigerated Services, Inc.
dba Harborside dba San Diego Terminals
PLA-Art International dba San Diego Cold
Otay Mesa Maintenance & Repair
Central California Warehousing Services, Inc. aka CCWS
Edward Plant
Frank Plant

2. Limits of Insurance**Schedule of Covered Premises**

<u>Location No.</u>	<u>Address</u>	<u>Limit of Insurance</u>
01	San Diego Refrigerated Services, Inc., 802 Terminal Street, San Diego, CA 92101-7813	\$5,000,000
02	PLA-ART International dba San Diego Cold, 1240 West 28th Street, National City, CA 91950-6319	\$3,500,000
03	Otay Mesa Maintenance & Repair, 8671 Lonestar Road, San Diego, CA 92154-7804	\$7,500,000

3. Deductibles

\$10,000 per occurrence

WAREHOUSEMAN'S LEGAL LIABILITY COVERAGE

Various provisions in this Coverage Form restrict or limit coverage. Read the entire Coverage Form and Certificate to determine what is and is not covered, and each party's rights and duties.

Words and phases that appear in bold are defined in section F. DEFINITIONS

A. COVERAGES

In consideration of premium charges hereinafter provided and subject to the following terms, conditions, exclusions, and limitations, this Company agrees:

1. a. To pay on behalf of the Insured those sums that the Insured becomes legally obligated to pay for **Property Damage** by reason of liability imposed upon the Insured as a warehouse operator or bailee resulting from an occurrence during the Certificate period.
1. b. To pay reasonable and necessary expenses incurred by the Insured during or after an Occurrence to protect, preserve, or recover customers' property stored at the Insured's Premises to prevent or mitigate actual or imminent loss, destruction or damage as a result of an Occurrence for which the Insured would be covered under the provisions of this Insurance. The amount paid for any such expenses will reduce the limits on this Insurance by the amount paid.
2. a. We may, at our discretion, investigate any occurrence and settle any claim or suit that may result, but the amount we will pay for damages is limited as described in section C. Limits Of Liability.
2. b. The Company has the right and duty, to defend any suit or other proceedings which may be brought against the Insured to enforce claims, even if such suits or proceedings are groundless, false or fraudulent. But:
 - (1) Company may make such investigation, negotiation and settlement of any claim or suit as the Company deems warranted whether such claim exceeds policy deductible or not;
 - (2) Company reserves and shall have the right to select defense attorneys and determine reasonable and appropriate compensation for those defense attorneys;
 - (3) Company's right and duty to defend shall end when Company has paid or tendered the applicable limit of insurance to one or more claimants.
 - (4) Company has no duty to defend the Insured against any suit or other proceedings seeking damages to which this insurance does not apply.
- c. We will pay, irrespective of the Company's "Limit(s) of Liability" otherwise specified herein:
 - (1) all expenses incurred by the Company;
 - (2) all expenses of litigation and all costs taxed against the Insured in proceedings defended by the Company;

- (3) the cost of appeal bonds and/or bonds to release attachments, but only for bond amounts within the applicable limit of insurance. The Company does not have any obligations to furnish these bonds;
- (4) all reasonable expenses incurred by the Insured at Company's request to assist in the investigation or defense of the claim or suit;
- (5) all interest on the full amount of any judgment that accrues after entry of the judgment and before Company has paid, offered to pay or deposited in court, the part of the judgment that is within the applicable limit of insurance.
- (6) Prejudgment interest awarded against the Insured on that part of the judgment the Company pays. If Company makes an offer to pay the applicable limit of insurance, Company will not pay any prejudgment interest based on that period of time after the offer.

3. Pollutant Clean Up and Removal Expense Coverage

In the event of an Occurrence that is covered by the Insurance, the following Additional Coverage also applies. The Limits of Insurance for this coverage is in addition to the Limits of Insurance shown in the Supplemental Declarations.

- a. We will pay expenses you incur to extract "pollutants" from land or water if the release, discharge, or dispersal of the "pollutants" is caused by a covered Occurrence for which coverage is afforded under this Coverage Form during the term of this Insurance. Such expenses will be paid only if they are reported to us within 180 days of the date of the Occurrence or the expiration date of this Certificate, whichever first occurs.
- b. Our Limit of Insurance under this additional coverage shall not exceed \$5,000 for the sum of all such expenses occurring during each separate 12-month period commencing with the Certificate inception date.
- c. "Pollutants" means any solid, liquid, gaseous, radioactive or thermal irritant or contaminant including, but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

B. EXCLUSIONS

Insurance provided under this Certificate shall not apply as respects any liability or expense:

- 1. For loss, destruction, or damage to property to which the Insured holds title or in which the Insured has any financial interest;
- 2. For liability assumed by the Insured under any contract or agreement, oral or written, expressed or implied, requiring the Insured to exercise a standard of care beyond the reasonable care standard imposed by law on the Insured as a public warehouse operator or bailee;
- 3. For loss, destruction, or damage to property to the extent that the Insured has been released from liability;

4. For loss, destruction, or damage to property when the damage was expected or intended by the **Insured**, regardless of whether or not the actual damage is in excess of that expected or intended;
5. For any penalties, fines, the multiplied portion of any damages or judgment, government assessments, punitive and/or exemplary damages;
6. For loss, destruction, or damage to property of others in the care, custody, or control of the **Insured** while acting as a carrier for hire;
7. For loss, destruction, or damage to property caused by the infidelity or dishonesty of the **Insured** or any person or persons in the employment or service of the **Insured**, whether or not such act or acts occur during the regular hours of employment or service;
8. For loss, destruction or damage caused by or resulting from forged bills of lading, loading, shipping or warehouse receipts;
9. For loss, destruction of, or damage to accounts, bills, currency, deeds, evidences of debt, bullion, precious metals, money, notes, securities, letters of credit or tickets, manuscripts, mechanical drawings, blueprints, documents, records or other valuable papers, furs or garments trimmed with fur, jewels, jewelry, or fine arts;
10. For any unexplained loss of property, and/or any mysterious disappearance of property, and/or any shortage of property provided that such loss, mysterious disappearance and/or shortage is based solely upon a discrepancy between a physical count and a book, computer or other inventory.
11. For loss, destruction, or damage to property caused by inadequate warehouse temperatures, if the inadequate temperature is a result of storing products in excess of the warehouse's storage capacity, provided that the **Insured** knew, or had reason to know, of the overcapacity;
12. For loss, destruction, or damage to property arising out of any processing performed by or on behalf of the **Insured**, unless endorsed hereon. This exclusion does not apply to normal handling, freezing and tempering;
13. Loss or damage to property stored gratuitously or as an accommodation;
14. **War and Military Action**
 - a. War, including undeclared or civil war;
 - b. Warlike action by military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
 - c. Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.
15. **Nuclear Activity**
Loss from nuclear reaction, nuclear radiation or radioactive contamination, whether deliberate or accidental, controlled or uncontrolled; and whether or not the loss is direct or indirect, proximate or remote.

C. LIMITS OF LIABILITY

1. The limits of insurance shown in the Declarations and/or Supplemental Declarations apply to all claims for **Property Damage** arising out of any one occurrence, and the aggregate payment by the Company for all claims under Coverages A.1.a. and A.1.b. shall not exceed the applicable insurance limit per occurrence.
2. The inclusion of more than one **Insured** shall not increase the applicable insurance limit per occurrence.
3. The number of claims resulting from any one occurrence shall not increase the applicable insurance limit per occurrence.
4. Payments made on one occurrence will not reduce the limits of insurance for another occurrence.
5. Subject to the provisions of Section H., Additional Conditions Paragraph 14 Automatic Coverage, coverage applies only at locations described in the Supplemental Declarations.

D. DEDUCTIBLE

From the total of all claims under Coverages A1.a. and A1.b. above, arising out of any one Occurrence, the sum indicated as the deductible in the Supplemental Declarations attached, shall be deducted and this Company shall only be liable for the excess of that amount.

E. PREMIUM

The premium charged for this Coverage Part is an annual premium for the coverage provided. The premium to be charged on each anniversary date is to be calculated based on the renewal information submitted.

F. DEFINITIONS

1. The unqualified word "**Insured**" includes the **Named Insured** and also includes any executive officer, director, employee or stockholder thereof while acting within the scope of his/her duties as such, and if the **Named Insured** is a partnership, the unqualified word "**Insured**" also includes any partner therein but only with respect to his/her liability as such. However, as respects Notice of Cancellation, it will only be necessary for this Company to send such notice to the **Named Insured** as stated in this Insurance.
2. The term "**Premises**," wherever employed in this Insurance, is defined as that portion of the building (s) located at the address(es) shown in the attached Supplemental Declarations which is (are) occupied by the **Insured** as a public warehouse, or contract warehouse locations as specifically identified as "contract warehouses" under the Schedule of Covered Premises in this policy, including platforms, parking lots, sidetracks and areas immediately adjacent thereto and within 100 feet thereof.
3. **Property Damage**" means physical loss, damage or destruction to tangible, personal property owned by others in the care, custody or control of the **Insured** while on the Premises of the **Insured** and includes loss of use of such property. **Property Damage** includes the reasonable and necessary costs incurred to remove the debris of such

property after an Occurrence. Property Damage includes actual loss of profits not to exceed those profits, which would have been realized from the sale of the lost, damaged or destroyed property. Property Damage does not include any other consequential damages including, but not limited to, personal injury, other lost profits, or damage to reputation or goodwill.

4. The term "Occurrence", wherever employed in this Insurance, is defined as (1) an accident that takes place during the period of insurance under this Certificate, or (2) in the absence thereof, a continuous or repeated exposure to conditions which unexpectedly cause loss or destruction of or damage to tangible property during the period of insurance under this Certificate, and all such exposure to substantially the same general conditions existing at or emanating from any one Premises specified in the Supplemental Declarations shall be deemed one Occurrence.
5. The term "Company" wherever employed in this Insurance means the Insurer issuing the Insurance and as set out in the Declaration Pages.

G. LOSS CONDITIONS

1. Duties In The Event of Accidents, Claim, or Suit
 - a. The Insured, upon knowledge of a claim or of any Occurrence which may give rise to a claim, shall give written notice thereof, with the most complete information obtainable, to the Company or its authorized agent, as soon as practicable. If such Occurrence involves a violation of law, immediate notice thereof shall be given by the Insured to the public police or other peace authorities having jurisdiction. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company or its authorized agent every demand, notice, summons, or other process received by him or his representative.
 - b. The Insured shall take all reasonable means to protect and safeguard customer property at and after an Occurrence and cooperate with the Company in facilitating the investigation and disposition of claims and suits and, upon the Company's request, shall attend hearings and trials and shall assist in effecting settlement, securing and giving evidence, obtaining the attendance of witnesses, and in the conduct of suits. The Insured shall not, except at its own cost, voluntarily assume any liability or incur any expense, or settle any claim without the prior written consent of the Company. The Company reserves the right to settle any claim, suit or other proceedings, as it may deem expedient.
2. Legal Action Against Company
 - a. No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this Insurance, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.
 - b. Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Insurance to the extent of the insurance afforded by this Certificate.

- c. Nothing contained in this Certificate shall give any person or organization any right to join the **Company** as a co-defendant in any action against the **Insured**.
- d. Bankruptcy or insolvency of the **Insured** or of the **Insured's** estate shall not relieve the **Company** of any of its obligations hereunder.

H. ADDITIONAL CONDITIONS

1. Inspections

We have the right, but are not obligated, to:

- a. make inspections and surveys at any time;
- b. give you reports on the conditions we find; and
- c. recommend changes.

Any inspections, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public and we do not warrant that conditions:

- are safe or healthful; or
- comply with laws, regulations or codes or standards.

This condition applies not only to us but also to any rating, advisory, rate service or similar organization, which makes insurance inspections, surveys, reports or recommendations.

2. No Benefit to Bailee

No person or organization, other than you will benefit from this insurance.

3. Assignment of Interest

Assignment of interest under this Insurance shall not bind the **Company** until its consent is endorsed hereon. If, however, the **Insured** shall die, or shall be adjudged bankrupt or insolvent and written notice is given to the **Company** within sixty (60) days after the date of such adjudication, this Insurance shall cover the **Insured's** legal representative as **Insured**, provided that notice of cancellation mailed to the Named **Insured** shall be sufficient notice.

4. Other Insurance

Insurance afforded by this Certificate shall be excess of any other insurance or bond available to the **Insured**, which would apply in the absence of this Insurance.

5. Excess Insurance

Permission can only be granted by the Company for other insurance excess of the insurance being provided by this Certificate when agreed to in writing by the Company.

6. Concealment, Misrepresentation or Fraud

Coverage under this Insurance is void in any case of fraud by you relating to it. Coverage is also void if you intentionally conceal or misrepresent a material fact concerning:

- a. coverage provided under this Insurance;
- b. the Insured Premises or operation(s);
- c. the types of property stored and handled.

7. Notification

All notices and other communications concerning this Certificate, other than Notices of Loss, shall be addressed to Lockton Companies, 444 West 47th Street, Kansas City, MO 64112-1906.

8. Notice of Loss

Upon the Occurrence of an event which is likely to result in a claim under this Policy, written notice shall be given to the Company or its authorized or appointed representative, Horvath & Lieber, P.C., Suite 1400, 10 South LaSalle Street, Chicago, IL, 60603, telephone number 1-800-511-7710, as soon as reasonably possible after the Insured has knowledge of the event. If suit is brought against the Insured to enforce any claim, the Insured shall make every effort to promptly forward the Company every summons or other process that may be served upon the Insured.

9. Insurance Under Two Or More Coverages

If two or more of this Certificate's Coverage Forms apply to the same occurrence we will not pay more than the actual amount of the covered loss.

10. Our Rights To Recover From Others

If any person or organization to or for whom the Company makes payment under this insurance has rights to recover damages from another, those rights are transferred to the Company. That person or organization must do everything necessary to secure Company's rights and must do nothing after loss to impair them. Any deductibles or other sums paid by the Insured shall not be reimbursed to the Insured until the Company shall have been fully reimbursed for any and all payments made by the Company.

11. Abandonment

There can be no abandonment of any property to us without our written consent.

12. Common Policy Conditions

All matters provided for in this Coverage Form shall be governed by the terms and

conditions of the Commercial Inland Marine Policy Form, . In the event of any conflict between the provisions of this Coverage Form and the Commercial Inland Marine Policy Form, the provisions of this Coverage Form shall prevail.

13. Cancellation Notice

Under Commercial Inland Marine Policy Form, Common Policy Conditions, the Cancellation Provision A. 2. b. is amended as follows:

It is agreed the number of days before the effective date of the cancellation or non-renewal is changed to 90 days.

14. Automatic Coverage

Automatic Coverage for each newly acquired location is provided for 30 days from the date the Insured acquires its ownership, leasehold or other interest in the newly acquired location for a Limit of Liability of \$1,000,000 subject to the provisions of this Coverage Form. The automatic coverage terminates at the earlier of:

- 1) the date the Insured reports the newly acquired location to Company as a scheduled location or
- 2) upon the expiration of 30 days from the date the Insured acquired its ownership, leasehold or other interest in said newly acquired location.

15. IARW Membership

It is a condition of coverage under this policy that the Named Insured maintain its membership, in good standing, with the International Association of Refrigerated Warehouses (IARW). If the Named Insured's membership in the IARW is terminated, for any reason, we shall have the right to cancel this policy in accordance with the Commercial Inland Marine Policy Common Policy Conditions of this policy.

**WAREHOUSEMAN'S LEGAL LIABILITY POLICY
COMMON POLICY CONDITIONS**

A. CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. INSPECTIONS AND SURVEYS

1. We have the right to:
 - a. Make inspections and surveys at any time;
 - b. Give you reports on the conditions we find; and
 - c. Recommend changes.
2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or

- b. Comply with laws, regulations, codes or standards.
- 3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.
- 4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. PREMIUMS

The first Named Insured shown in the Declarations:

- 1. Is responsible for the payment of all premiums, and
- 2. Will be the payee for any return premiums we pay.

F. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

COMMERCIAL INLAND MARINE CONDITIONS POLICY CONDITIONS

A. POLICY COMPOSITION

This policy is composed of this policy jacket, the Commercial Inland Marine Declarations, and one or more Coverage Forms or endorsement.

The conditions in this policy jacket apply in addition to applicable conditions in Commercial Inland Marine Coverage Forms and Endorsements.

However, any Condition contained in a Commercial Inland Marine Coverage Form or Endorsement supersedes any conflicting condition in this jacket.

B. POLICY LANGUAGE

Parts of this policy are written in simplified language, but some parts may not be. In this policy the following words have the same meaning:

“You” and “Your” refer to the Named Insured shown in the Commercial Inland Marine Declarations.

“Named Insured” refers to You or Your.

“We,” “Us” and “Our” refer to the company providing this insurance.

“Company” refers to we, us or our.

C. POLICY CANCELLATION

Common Policy Condition A., Cancellation, applies to all Commercial Inland Marine Coverage Forms and Endorsements, unless a special state Cancellation Endorsement applies.

LOSS CONDITIONS

A. ABANDONMENT

There can be no abandonment of any property to us.

B. APPRAISAL

If we and you disagree on the value of the property or the amount of “loss,” either may make written demand for an appraisal of the “loss.” In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of “loss.” If they fail to agree, they will submit their difference to the umpire. A decision agreed to by any two will be binding. Each party will:

1. Pay its chosen appraiser; and
2. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we will still retain our right to deny the claim.

C. DUTIES IN THE EVENT OF LOSS

You must see that the following are done in the event of “loss” to Covered Property:

1. Notify the police if a law may have been broken.
2. Give us prompt notice of the "loss." Include a description of the property involved.
3. As soon as possible, give us a description of how, when and where the "loss" occurred.
4. Take all reasonable steps to protect the Covered Property from further damage. If feasible, set the damaged property aside and in the best possible order for examination. Also keep a record of your expenses, for consideration in the settlement of the claim.
5. Make no statement that will assume any obligation or admit any liability, for any "loss" for which we may be liable, without our consent.
6. Permit us to inspect the property and records proving "loss."
7. If requested, permit us to question you under oath, at such times as may be reasonably required, about any matter relating to this insurance or your claim, including your books and records. In such event, your answers must be signed.
8. Send us a signed, sworn statement of "loss" containing the information we request to settle the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.
9. Promptly send us any legal papers or notices received concerning the "loss."
10. Cooperate with us in the investigation or settlement of the claim.

D. INSURANCE UNDER TWO OR MORE COVERAGES

If two or more of this policy's coverages apply to the same "loss," we will not pay more than the actual amount of the "loss."

E. LOSS PAYMENT

We will pay or make good any "loss" covered under this Coverage Part within 30 days after:

1. We reach agreement with you;
2. The entry of final judgment; or
3. The filing of an appraisal award.

We will not be liable for any part of a "loss" that has been paid or made good by others.

F. OTHER INSURANCE

If you have other insurance covering the same "loss" as the insurance under this Coverage Part, we will pay only the excess over what you should have received from the other insurance. We will pay the excess whether you can collect on the other insurance or not.

G. PAIR, SETS OR PARTS

1. Pair or Set. In case of "loss" to any part of a pair or set we may:
 - a. Repair or replace any part to restore the pair or set to its value before the "loss"; or
 - b. Pay the difference between the value of the pair or set before and after the "loss."
2. Parts. In case of "loss" to any part of Covered Property consisting of several parts when complete, we will only pay for the value of the lost or damaged part.

H. PRIVILEGE TO ADJUST WITH OWNER

In the event of "loss" involving property of others in your care, custody or control, we have the right to:

1. Settle the "loss" with the owners of the property. A receipt for payment from the owners of that property will satisfy any claim of yours.
2. Provide a defense for legal proceedings brought against you. If provided, the expense of this defense will be at our cost and will not reduce the applicable Limit of Insurance under this insurance.

I. RECOVERIES

Any recovery or salvage on a "loss" will accrue entirely to our benefit until the sum paid by us has been made up.

J. REINSTATEMENT OF LIMIT AFTER LOSS

The Limit of Insurance will not be reduced by the payment of any claim, except for total "loss" of a scheduled item, in which event we will refund the unearned premium on that item.

K. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this insurance has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "loss" to impair them.

GENERAL CONDITIONS

A. CONCEALMENT, MISREPRESENTATION OR FRAUD

This Coverage Part is void in any case of fraud, intentional concealment or misrepresentation of a material fact, by you or any other insured, at any time, concerning:

1. This Coverage Part;
2. The Covered Property;
3. Your interest in the Covered Property; or
4. A claim under this Coverage Part.

B. LEGAL ACTION AGAINST US

No one may bring a legal action against us under this Coverage Part unless:

1. There has been full compliance with all the terms of this Coverage Part; and
2. The action is brought within 2 years after you first have knowledge of the "loss."

C. NO BENEFIT TO BAILEE

No person or organization, other than you, having custody of Covered Property, will benefit from this insurance.

D. POLICY PERIOD

We cover "loss" commencing during the policy period shown in the Declarations.

E. VALUATION

The value of property and the most we will pay for "loss" to that property will be the least of the following "amounts":

1. The actual cash value of that property;
2. The cost of reasonably restoring that property to its condition immediately before "loss"; or
3. The cost of replacing that property with property of like kind and quality.

In the event of "loss," the value of property will be determined as of the time of "loss."

**INSTITUTE RADIOACTIVE CONTAMINATION, CHEMICAL, BIOLOGICAL,
BIO-CHEMICAL AND ELECTROMAGNETIC WEAPONS EXCLUSION
CLAUSE**

This clause shall be paramount and shall override anything contained in this insurance inconsistent therewith

1. In no case shall this insurance cover loss damage liability or expense directly or indirectly caused by or contributed to by or arising from
 - 1.1 ionising radiations from or contamination by radioactivity from any nuclear fuel or from any nuclear waste or from the combustion of nuclear fuel
 - 1.2 the radioactive, toxic, explosive or other hazardous or contaminating properties of any nuclear installation, reactor or other nuclear assembly or nuclear component thereof
 - 1.3 any weapon or device employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter
 - 1.4 the radioactive, toxic, explosive or other hazardous or contaminating properties of any radioactive matter. The exclusion in this sub-clause does not extend to radioactive isotopes, other than nuclear fuel, when such isotopes are being prepared, carried, stored, or used for commercial, agricultural, medical, scientific or other similar peaceful purposes
 - 1.5 any chemical, biological, bio-chemical, or electromagnetic weapon.

10/11/03

CL370

Radioactive Contamination Exclusion Clause (USA Endorsement)

This insurance (reinsurance) is subject to the Institute Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons Exclusion Clause Cl.370 dated 10/11/03 provided that

if fire is an insured peril

and

where the subject matter insured or, in the case of a reinsurance, the subject matter insured by the original insurance, is within the USA, its islands, onshore territories or possessions

and

a fire arises directly or indirectly from one or more of the causes detailed in sub-clauses 1.1, 1.2, 1.4 and 1.5 of the Institute Radioactive Contamination, Chemical, Biological, Bio-Chemical and Electromagnetic Weapons Exclusion Clause Cl.370 dated 10/11/03.

any loss or damage arising directly from that fire shall, subject to the provisions of this insurance (reinsurance), be covered, excluding however any loss damage liability or expense caused by nuclear reaction nuclear radiation or radioactive contamination arising directly or indirectly from that fire.

INSTITUTE SERVICE OF SUIT CLAUSE (U.S.A.)

It is agreed that in the event of the failure of the Underwriters severally subscribing this insurance (the Underwriters) to pay any amount claimed to be due hereunder, the Underwriters, at the request of the Assured, will submit to the jurisdiction of a court of competent jurisdiction with the United States of America.

Notwithstanding any provision elsewhere in this insurance relating to jurisdiction, it is agreed that the Underwriters have the right to commence an action in any court of competent jurisdiction in the United States of America, and nothing in this clause constitutes or should be understood to constitute a waiver of the Underwriters' rights to remove an action to a United States Federal District Court or to seek remand there from or to seek a transfer of any suit to any other court of competent jurisdiction as permitted by the laws of the United States of America or any state therein.

Subject to the Underwriters' rights set forth above:

(a) It is further agreed that the Assured may serve process upon any senior partner in the firm of:

LeBoeuf, Lamb, Greene & McRae
1025 55th St
New York, NY 10019-5389
U.S.A

and that in any suit instituted against any one of them upon this contract the Underwriters will abide by the final decision of the Court or of any Appellate Court in the event of an appeal.

- (b) The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon the Underwriters' behalf in the event such a suit shall be instituted.
- (c) The right of the Assured to bring suit as provided herein shall be limited to a suit brought in its own name and for its own account. For the purpose of the suit as herein provided the word Assured includes any mortgagee under a ship mortgage which is specifically named as a loss payee in this insurance and any person succeeding to the rights of any such mortgagee.
- (d) Further, pursuant to any statute of any state, territory or district of the United States of America which makes provision therefore, Underwriters hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office (the Officer), as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary

hereunder arising out of this contract of insurance, and hereby designate the above-named as the person to whom the Officer is authorized to mail such process or a true copy thereof.

If this clause is attached to a contract of reinsurance the terms insurance and Assured shall mean reinsurance and Reassured respectively.

SEVERAL LIABILITY NOTICE

The subscribing Underwriters' obligations under Contracts of insurance to which they subscribe are several and not joint and are limited solely to the extent of their individual subscriptions. The subscribing underwriters are not responsible for the subscription of any co-subscribing underwriter who for any reason does not satisfy all or part of its obligations.

NOTICE:

- 1. The insurance policy that you [have purchased] [are applying to purchase] is being issued by an insurer that is not licensed by the state of California. These companies are called "nonadmitted" or "surplus line" insurers.**
- 2. The insurer is not subject to the financial solvency regulation and enforcement which applies to California licensed insurers.**
- 3. The insurer does not participate in any of the insurance guarantee funds created by California law. Therefore, these funds will not pay your claims or protect your assets if the insurer becomes insolvent and is unable to make payments as promised.**
- 4. California maintains a list of eligible surplus line insurers approved by the insurance commissioner. Ask your agent or broker if the insurer is on that list.**
- 5. For additional information about the insurer you should ask questions of your insurance agent, broker, or "surplus line" broker or contact the California Department of Insurance at the following toll-free number: 1-800-927-4357.**

AUG-17-2007 11:04

HORVATH WEAVER

3124196666 P.01/01

Sent BY: SAN DIEGO COLD STORAGE
To: HARBORSIDE

4748100;

Sep 06 2:16PM;

Page 1/1

At: 70. 87

FAX NO. :760 5920528

Aug. 25 2006 05:55PM p1

Memo of Understanding

I, Alberto Sanchez, owner of Del Rancho Foods, agree to the following terms of my meeting with Jerry Marcus, August 5, 2006 at Marcus Food Company, Inc.

1. I will have my accountant call Jerry tomorrow, August 9, to discuss the viability and profitability of Del Rancho Foods.
2. I will send weekly to Jerry my P&L statement for the previous week. In addition I will send my balance sheet monthly. I will apprise Marcus Food Company, Inc. of my receivables, and make them aware of any problem areas, on a timely basis.
3. I will allow Marcus Food Company, Inc. to file UCC filings on my real business property, inventory, and equipment.
4. I am assuming debt of approximately \$479,000 comprised of the following
 - a. Approximately \$156,000 of current receivables due Marcus Food Company, Inc.
 - b. Approximately \$149,000 of products delivered to me by Sergio Hernandez that was not involved by Marcus Food Company, Inc.
 - c. Approximately \$80,000 of outstanding receivables to Henry Hernandez
 - d. \$100,000 of misappropriated funds by Sergio Hernandez from Henry Hernandez

Alberto Sanchez
Alberto Sanchez

Jerry Marcus
Jerry Marcus

EXHIBIT B

TOTAL P.01

1 THE LAW OFFICES OF KEVIN GERRY
2 A Professional Corporation
3 Kevin Gerry (State Bar #129690)
4 1001 Olive Street, 1st floor
5 Santa Barbara, California 93103
6 Telephone: (805) 899-2990
7 Facsimile: (805) 899-2940

2007 MAY 10 PM 12:39

LENORE CHIURCO, CLERK
SAN DIEGO COUNTY, CA

8 Attorneys for Plaintiff Marcus Foods

9

10

11

12

13

14

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

15

MARCUS FOODS, a Kansas Corporation,
16 Plaintiff,

Case No.: 37-2007-00066571-CU-CO-CTL

17

COMPLAINT FOR DAMAGES:

18

vs.

1) BREACH OF CONTRACT
2) CONVERSION

19

SAN DIEGO COLD STORAGE, INC., a
21 California Corporation, MIGUEL CUEVA,
22 an Individual, SERGIO HERNANDEZ, an
23 individual, and DOES 1 thru 100, inclusive,
24 Defendants.

25

26

27

28 PLAINTIFF MARCUS FOODS ALLEGES AS FOLLOWS:

1
EXHIBIT
C

INTRODUCTION

1. PLAINTIFF MARCUS FOOD COMPANY, INC., (hereinafter "PLAINTIFF" or "MARCUS FOODS") is a corporation, duly incorporated in the State of Kansas and registered to do business in the State of California. PLAINTIFF MARCUS FOODS is engaged in the business of marketing and selling food products to buyers and retailers in the food services industry.

2. PLAINTIFF is informed and believes, and upon such information and belief alleges that DEFENDANT SAN DIEGO COLD STORAGE, (hereinafter "DEFENDANT" OR "SAN DIEGO COLD STORAGE") is and at certain times mentioned herein was, a business entity, engaged in business in the State of California as SAN DIEGO COLD STORAGE.

3. PLAINTIFF is informed and believes, and upon such information and belief alleges that DEFENDANT SAN DIEGO COLD STORAGE is engaged in the business of providing warehouse and cold-storage facilities for hire, pursuant to California Commercial Code §7102(1)(h). The DEFENDANT'S SAN DIEGO COLD STORAGE facility is located at 1240 West 28th Street, in National City, California.

4. PLAINTIFF is informed and believes, and upon such information and belief alleges that DEFENDANT MIGUEL CUEVA is employed by DEFENDANT SAN DIEGO COLD STORAGE as the foreman of the SAN DIEGO COLD STORAGE facility located at 1240 West 28th Street, in National City, California.

5. PLAINTIFF is informed and believes, and upon such information and belief alleges that DEFENDANT SERGIO HERNANDEZ is an independent and self-employed sales-

1 agent engaged in business at DEFENDANT SAN DIEGO COLD STORAGE'S facility
2 located at 1240 West 28th Street, in National City, California.

3 6. PLAINTIFF does not know the true names or capacities of those DEFENDANTS
4 named herein as DOES 1 through 100. PLAINTIFF will amend this Complaint to allege
5 their true names and capacities when the same have been ascertained, or according to
6 proof at the time of trial.

7 7. PLAINTIFF is informed and believes, and upon such information and belief
8 alleges, that each fictitiously named DEFENDANT is responsible in some manner for
9 the acts and/or occurrences alleged hereafter, and that each DEFENDANT was
10 authorized and/or empowered by the remaining DEFENDANTS to, and did in fact act as
11 the agent and/or employee of the remaining DEFENDANTS in that PLAINTIFF'S losses
12 as herein alleged were proximately caused by their acts and/or omissions. At all times
13 relevant herein, each DEFENDANT was the agent and/or employee of each of the other
14 DEFENDANTS and was at all times relevant herein acting within the purpose and scope
15 of such agency and/or employment. At all times herein below, unless otherwise
16 specified, DEFENDANTS SAN DIEGO COLD STORAGE, MIGUEL TAMAYO, SERGIO
17 HERNANDEZ and Does 1 through 100, inclusive, will be referred to collectively as
18 "DEFENDANTS" in the balance of the Complaint for Damages.

23
24 **STATEMENT OF FACTS**
25

26 8. On or about June of 2005 PLAINTIFF MARCUS FOODS and DEFENDANT SAN
27 DIEGO COLD STORAGE entered into a written agreement (hereinafter the
28

1 "CONTRACT") wherein DEFENDANT SAN DIEGO COLD STORAGE agreed to provide
2 PLAINTIFF MARCUS FOODS with warehouse and cold-storage facilities for hire. The
3 CONTRACT specifically provides for the transfer of PLAINTIFF MARCUS FOODS
4 goods and products to DEFENDANT SAN DIEGO COLD STORAGE'S warehouse for
5 storage and release of said products only to those MARCUS FOODS customers as
6 PLAINTIFF MARCUS FOODS would direct (a copy of the CONTRACT attached hereto
7 as Exhibit "A").

8
9 9. On or about June of 2005 and continuing for several months thereafter, PLAINTIFF
10 MARCUS FOODS delivered goods and food-products to DEFENDANT SAN DIEGO
11 COLD STORAGE'S warehouse for safe keeping and cold-storage.

12 10. At the time of each of PLAINTIFF'S delivery of said goods and food-products, a
13 warehouse receipt was issued by DEFENDANT SAN DIEGO COLD STORAGE to
14 PLAINTIFF MARCUS FOODS therefore. In return for valuable consideration paid by
15 PLAINTIFF MARCUS FOODS, DEFENDANT SAN DIEGO COLD STORAGE accepted
16 each of PLAINTIFF'S goods and food-products, and agreed to the storage and release
17 of PLAINTIFF'S goods and food-products only to those MARCUS FOODS customers as
18 PLAINTIFF MARCUS FOODS would direct.

19 21 11. In approximately February of 2006 and continuing for several months thereafter,
22 DEFENDANTS and each of them agreed, conspired, planned and engaged in the
23 release of and sale to third parties of PLAINTIFF'S goods and food-products without the
24 knowledge, authorization or consent of PLAINTIFF MARCUS FOODS.

25 26 12. In approximately August of 2006, PLAINTIFF MARCUS FOODS discovered the
27 ongoing and unauthorized release of and sale to third parties of PLAINTIFF'S goods

1 and food-products by the DEFENDANTS and each of them. The unauthorized release
2 of PLAINTIFF'S goods and food-products by the DEFENDANTS was thereafter
3 confirmed by DEFENDANT SAN DIEGO COLD STORAGE in August of 2006 (a copy of
4 DEFENDANT'S Inventory of Missing Product is attached hereto as Exhibit "B").
5

6

7 **FIRST CAUSE OF ACTION**

8 (Breach of Contract – Against Defendant San Diego Cold Storage)
9

10 13. PLAINTIFF MARCUS FOODS re-alleges and incorporates by reference
11 paragraphs 1 through 12, inclusive, as though fully set forth herein.

13 14. PLAINTIFF MARCUS FOODS has performed all conditions, express and implied,
14 in accord with the CONTRACT.

15 15. DEFENDANT SAN DIEGO COLD STORAGE'S acts and omissions as alleged
16 above, including but not limited to the wrongful release of PLAINTIFF'S goods and food-
17 products constitute a breach of said CONTRACT.

19 16. PLAINTIFF MARCUS FOODS has demanded that DEFENDANT SAN DIEGO
20 COLD STORAGE return said food products to PLAINTIFF, but DEFENDANT SAN
21 DIEGO COLD STORAGE has failed and refused, and continues to fail and refuse to
22 return PLAINTIFF'S goods and food-products.

24 17. As a direct and proximate result of DEFENDANT SAN DIEGO COLD
25 STORAGE'S breach of said CONTRACT and as a direct and proximate result of the
26 acts and omissions as alleged above, PLAINTIFF MARCUS FOODS has sustained
27 damages in an amount to be proven at trial.
28

SECOND CAUSE OF ACTION

(Conversion – Against All Defendants)

18. PLAINTIFF MARCUS FOODS re-alleges and incorporates by reference paragraphs 1 through 17, inclusive, as though fully set forth herein.

19. By its wrongful release of, possession of and exercise of dominion and control over PLAINTIFF'S goods and food-products, DEFENDANTS and each of them converted the PLAINTIFF'S goods and food-products to and for their own use. The DEFENDANTS and each of them exercised possession and control of PLAINTIFF'S goods and food-products and at all relevant times therein, had the power to sell to third parties the PLAINTIFF'S goods and food-products without PLAINTIFF MARCUS FOODS' authorization or consent.

20. As a direct and proximate result of DEFENDANTS, conversion of the PLAINTIFF'S goods and food-products and as a direct and proximate result of the acts and omissions as alleged above, PLAINTIFF MARCUS FOODS has sustained damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, PLAINTIFF MARCUS FOODS prays for Judgment against
DEFENDANTS, and each of them, as follows:

1. Compensatory damages in an amount according to proof;

- 1
2. Consequential damages reasonably foreseeable as a result of the
3. DEFENDANT'S acts and/or omissions;
4. Punitive Damages, as to the Second Cause of Action only, to punish and deter
5. the DEFENDANTS from future and further actions as described therein;
6. Attorneys' Fees and Costs of Suit as provided by law; and,
7. For such other relief as the Court shall deem just and proper.
- 8
- 9

10 DATED: April 30, 2007

11 THE LAW OFFICES OF KEVIN GERRY

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15 Kevin Gerry
16 Attorneys for Plaintiff Marcus Foods
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EXHIBIT "A"

PLA-ART INTERNACIONAL, INC. dba SAN DIEGO COLD STORAGE

CONTRACT TERMS AND CONDITIONS

SECTION 1 - DEFINITIONS

As used in this Warehouse Receipt or Consignment and Sales Agreement (collectively and/or individually "warehouse receipt"), the following terms have the following meanings:

(a) STORE: The person, firm, corporation or other entity for whom the GOODS described herein are stored and in whom the Warehouse Receipt is issued and appears as claimant on behalf of the GOODS.

(b) COMPANY: PLA-ART INTERNATIONAL, INC. dba SAN DIEGO COLD STORAGE. As used in Sections 9 and 10 herein COMPANY includes officers, directors, employees and agents of the COMPANY while acting within the scope and course of their employment.

(c) LOT: Unit or article of GOODS which is separately identified by the COMPANY.

(d) ADVANCE: All sums due or payable to be due to COMPANY from STORE or other relating to the GOODS regardless of the source, whether liquidated or not, including but not limited to, rent, disbursement, charges made prior to or accrual of STORE to COMPANY, necessary for preservation of GOODS or reasonably incurred in their sale, purchase or use.

(e) GOODS: The personal property for which any service, which is described herein and/or which COMPANY has agreed to make available to it, is the Warehouse Receipt.

SECTION 2 - TENDER FOR STORAGE

(f) An GOODS for storage shall be delivered at the warehouse properly marked and packed for shipping.

(g) STORE shall furnish, in order to each delivery, a manifest showing marks, brands or signs to be kept and accounted for separately and the date of storage desired. Otherwise the GOODS may be stored in bulk or stacked less in boxes, angles or general storage at the discretion of the COMPANY and charges for such storage will be based on the specific storage rates.

(h) Receipt and delivery of all or any part of a LOT shall be made without subsequent sorting except by special arrangement and subject to a charge.

(i) COMPANY shall store and deliver GOODS only in the packages in which they are originally received unless otherwise agreed to in writing.

(j) Unless STORE shall have given, at or prior to delivery of the GOODS, written instructions to the storage COMPANY, to be followed, any consignment and store in bulk different lots of fungible GOODS, which are not covered by the terms of STORE.

(k) COMPANY shall not be responsible for segregating GOODS by production code date unless specifically agreed to in writing.

SECTION 3 - IDENTIFICATION OF STORAGE

(l) COMPANY may, upon written notice, as required by law, require the removal of the GOODS, or any portion thereof, from the warehouse upon the payment of advances attributable to said GOODS within a stated period, not less than 10 days after such notification. If said GOODS are not so removed, COMPANY may sell them as provided by law and shall be entitled to receive any net gain it has under the law with respect to said GOODS.

(m) As is the practice of COMPANY, GOODS may be stored in depositories or destined to value to less than the amount of COMPANY's liability, or may consolidate a hazard to other property or to the warehouse or persons, the GOODS may be removed or disposed of by COMPANY as permitted by law. All charges related to such removal shall be paid by STORE.

SECTION 4 - STORAGE LOCATIONS

(a) The GOODS shall be stored in COMPANY's facilities in any one or more buildings at COMPANY's warehouse complex, located on the (first) side of this Warehouse Receipt. The identification of any specific location within COMPANY's warehouse complex, or the GOODS shall be stored therein.

(b) Subject to any specific written instructions given by STORE, COMPANY may, at its expense, and without notice to STORE, remove any GOODS from the room or area of the warehouse complex to any other room or area thereof.

(c) Upon written notice to the STORE, COMPANY may, at its expense, remove the GOODS to any other warehouse complex operated by COMPANY,

SECTION 5 - STORAGE CHARGES

(a) Storage charges commence upon the date the COMPANY accepts care, custody and control of the GOODS, regardless of undelivered date or date warehouse receipt is issued. Charges shall be computed separately for each LOT or one of the following optional basis:

(b) If storage fees quoted on a "SPLIT MONTH BASIS" the storage month shall be a calendar month. A full month's storage charge will apply to all GOODS received between the 1st and 14th, including a calendar month. One-half month's storage charge will apply to all GOODS received between the 15th and last day, including a calendar month. A full month's storage charge shall apply on the 1st day of the next calendar month and each month thereafter as GOODS are remaining in storage.

(c) If storage fees quoted on an "ANNUAL BASIS" the storage month shall extend from date of receipt in one calendar month, to the next month, the same date of the first month. If there is no calendar month in the next month, the storage month will end on the last day of said next month. A full month's storage charge shall apply as of receipt of GOODS and an additional monthly storage charge shall apply to each successive storage month as of 1st day of month remaining in storage.

(d) Charges shall be applicable as of 1st day of the month quoted or other document issued by COMPANY to STORE under COMPANY's name.

(e) Unless COMPANY specifies otherwise all storage charges are due and payable on the 1st day of storage for the initial month and thereafter on the 1st day of each calendar month.

(f) Rates quoted by warehouse, unless otherwise specified, are computed on gross weight and 3,000 pounds shall constitute a ton.

SECTION 6 - HANDLING CHARGES

(a) Unless otherwise specified or stated by COMPANY, handling charges cover only the ordinary labor and duties involved in moving and delivering undelivered GOODS on pallets at the warehouse dock during normal warehouse hours but do not include loading and unloading.

(b) If rates otherwise specified, a charge in addition to the regular handling charges will be made for any work performed by COMPANY other than specified in Section (a) or rates which are in effect from time to time, a copy of which rates are available upon request.

(c) Since GOODS are ordered in quantities less than which received, the COMPANY may make an additional charge for each order or each item of a order.

(d) Delivery of the COMPANY of lots from all units of any LOT or article that all the fungible GOODS stored by STORE shall be made without subsequent sorting, except by special arrangement and subject to an additional charge.

SECTION 7 - TRANSFER OF TITLE; DELIVERY

(a) Instructions by STORE to transfer GOODS to the account of another are not effective until delivered to and accepted by COMPANY. Charges will be made for such units and for any reshipping of GOODS deemed by COMPANY to be reshipped. COMPANY reserves the right not to deliver or transfer GOODS to or for the account of others except upon receipt of written instructions properly signed by STORE.

(b) STORE may furnish written instructions authorizing COMPANY to accept telephone orders for delivery, in such case, (1) COMPANY may require that each telephone order be confirmed by STORE in writing within 24 hours and (2) acceptance by COMPANY of any telephone order shall be at the risk of STORE. COMPANY will not be liable for any loss resulting from delivery made pursuant to telephone order, whether or not so authorized, unless COMPANY failed to exercise reasonable care with respect thereto.

(c) COMPANY shall have a reasonable time to make delivery after GOODS are ordered out and shall have a minimum of 10 business days after receipt of a delivery order in which to locate any missing GOODS.

(d) If COMPANY has exercised reasonable care and is unable, due to events beyond its control, to effect delivery within a reasonable time of the current storage period, the GOODS will be subject to storage charges for each succeeding storage period.

(e) All inquiries and requests for delivery of GOODS or transfer of title are treated subject to satisfaction of all charges, dues and service charges of COMPANY with respect to the GOODS whether for accrued charges or ADVANCES otherwise.

(f) COMPANY may require, as a condition precedent to delivery, a statement from STORE holding COMPANY harmless from claims of others asserting a superior right to STORE to possession of the GOODS. Nothing herein shall preclude COMPANY from exercising any other remedy available to it under the law to resolve conflicting claims to possession of the GOODS. All costs, including attorney's fees, incurred by COMPANY in its defense in any way in COMPANY's estimation referred to in SECTION 7 (f) shall be charged to STORE and shall, for purposes of Section 12 below, be considered "charges present or future with respect to such GOODS" and shall such as a lien on the GOODS.

SECTION 8 - OTHER SERVICES AND CHARGES

(a) Other services rendered in the course of STORE or the GOODS are chargeable to STORE. Such services may include, but are not limited to, the following: furnishing of special warehouse space or equipment, repairing, repairing, stamping, weighing, sealing, inspecting, sampling, storing, reconditioning, marking, tailoring, furnishing

warehouses, repairing or recovering marked weighing instruments, handling railroad expense bills, and handling shipments.

(b) All ADVANCES are due and payable immediately. All charges are due and payable upon the date of invoice. All charges and ADVANCES not paid within 30 days from the due date are subject to no lesser charge than the date of charge or ADVANCE because due until paid, at the lesser of 1.9% per month or the maximum amount allowed by law.

(c) STORE may, subject to reasonable requirements and reasonable limitations, leave the GOODS when accompanied by an employee of COMPANY who is then chargeable to STORE.

(d) In the event of damage or threatened damage to the GOODS, STORE shall pay all reasonable and necessary costs of preventing and repairing stored property. The responsibility to determine that such damage or threatened damage to the GOODS is the responsibility of STORE shall be determined by the COMPANY.

(e) COMPANY shall supply damage prevention and fastening when it deems it appropriate on outbound shipments and the cost thereof is chargeable to STORE.

(f) Any additional costs incurred by COMPANY in unloading cars or trucks containing damaged GOODS are chargeable to STORE.

(g) COMPANY shall not be responsible for damage charges or delays in loading or unloading unless such damage or delay was caused solely by COMPANY's negligence.

(h) A charge in addition to regular storage and handling rates will be made for bonded storage.

(i) COMPANY may assess an additional charge to storage when GOODS, deposited for forward storage, are received in temperatures above 5 degrees Fahrenheit; however COMPANY shall not be responsible for loss of freezing GOODS unless STORE specifically requests such service as written.

(j) All storage, handling and other services may be subject to minimum charges.

(k) STORE agrees to pay COMPANY all costs and ADVANCES including reasonable attorney's fees incurred by COMPANY in connection with the storage, handling and/or disposition of the GOODS, including without limitation, such costs, ADVANCES, and/or fees relating to lawsuits (including attorney's fees) involving a waybill or GOODS and/or STORE's performance under this agreement. All such costs, ADVANCES, and fees, for purposes of SECTION 12 below, shall constitute "charges present or future with respect to such GOODS".

SECTION 9 - LIABILITY AND LIMITATION OF DAMAGES

(a) COMPANY shall not be liable for any loss, damage or destruction to GOODS, however caused, unless such loss, damage or destruction resulted from the COMPANY's failure to exercise such care it deems fit to the GOODS as reasonably caused men would exercise under the circumstances. COMPANY is not liable for damages which could not have been avoided by the exercise of such care.

(b) COMPANY and STORE agree that COMPANY's duty of care referred to in Section 9(a) above does not extend to providing a regular supply of the warehouse complex or any portion thereof.

(c) Unless specifically agreed to in writing, COMPANY shall not be required to store GOODS in a humidity controlled environment or be responsible for temperature GOODS.

(d) IN THE EVENT OF LOSS, DAMAGE OR DESTRUCTION TO GOODS FOR WHICH THE COMPANY IS LEGALLY LIABLE, STORE DECLARER THAT COMPANY'S LIABILITY SHALL BE LIMITED TO THE LESSER OF THE FOLLOWING: (1) THE ACTUAL COST TO STORE OF REPLACING OR REPRODUCING THE LOST, DAMAGED, AND/OR DESTROYED GOODS TOGETHER WITH TRANSPORTATION COSTS TO WAREHOUSE, (2) THE FAIR MARKET VALUE OF THE LOST, DAMAGED, AND/OR DESTROYED GOODS ON THE DATE STORE IS NOTIFIED OF LOSS, DAMAGE AND/OR DESTRUCTION, (3) IN TIMES THE MONTHLY STORAGE CHARGE APPLICABLE TO SUCH LOST, DAMAGED AND/OR DESTROYED GOODS, (4) \$0 PER POUND FOR FAID LOST, DAMAGED, AND/OR DESTROYED GOODS, PROVIDED, HOWEVER, THAT WITHIN A REASONABLE TIME AFTER RECEIPT OF THIS WAREHOUSE RECEIPT, STORE MAY, UPON WRITTEN REQUEST INCREASE COMPANY'S LIABILITY ON PART OR ALL OF THE GOODS IN WHICH CASE AN INCREASED CHARGE WILL BE MADE BASED UPON SUCH INCREASED VALUATION; FURTHER PROVIDED THAT NO SUCH REQUEST SHALL BE VALID UNLESS MADE BEFORE LOSS, DAMAGE OR DESTRUCTION TO ANY PORTION OF THE GOODS HAS OCCURRED.

(e) The COMPANY, it's fully referred to in Section 9(f), shall be STORE's exclusive remedy against COMPANY for any claim or cause of action which ever relating to loss, damage and/or destruction of GOODS and shall apply to all claims including inventory shortage and mysterious disappearance claims, unless STORE proves by affirmative evidence that COMPANY knew the GOODS to be its own or, STORE, in its sole rights to rely upon any presumption of conversion imposed by law. In no event shall STORE be entitled to incidental, special, punitive, or consequential damages.

SECTION 10 - NOTICE OF CLAIM AND FILING OF SUIT

(a) COMPANY shall not be liable for any claim of any type whatsoever for loss and/or destruction of and/or damage to GOODS unless with claim is presented, in writing, within a reasonable time, not exceeding 60 days after STORE learns of it. In the exercise of reasonable care, should have learned of such loss, destruction and/or damage.

(b) As a condition precedent to making any claim under this suit, STORE shall provide COMPANY with a reasonable opportunity to inspect the GOODS which are the basis of STORE's claim.

(c) NO LAWSUIT OR OTHER ACTION MAY BE MAINTAINED BY STORE OR OTHER AGAINST COMPANY WITH RESPECT TO THE GOODS UNLESS A TIMELY WRITTEN CLAIM HAS BEEN MADE AS PROVIDED IN PARAGRAPH (a) OF THIS SECTION AND UNLESS STORE HAS PROVIDED WAREHOUSEMAN WITH A REASONABLE OPPORTUNITY TO INSPECT THE GOODS AS PROVIDED IN PARAGRAPH (b) OF THIS SECTION AND UNLESS SUCH LAWSUIT OR OTHER ACTION IS COMMENCED WITHIN NINE (9) MONTHS AFTER STORE LEARNS OR, IN THE EXERCISE OF REASONABLE CARE, SHOULD HAVE LEARNED OF THE LOSS AND/OR DESTRUCTION OF AND/OR DAMAGE TO THE GOODS.

SECTION 11 - INSURANCE

GOODS are not insured by COMPANY and the storage rates do not include insurance on the GOODS unless COMPANY has agreed, in writing, to obtain such insurance for the benefit of STORE.

SECTION 12 - LIEN

COMPANY will have a lien against the GOODS and on the proceeds thereof for all charges for storage, handling, transportation (including damage and unusual charges), insurance, labor and other charges present or future with respect to the GOODS, ADVANCES or loss by COMPANY in relation to the GOODS and for expense necessary for preservation of the GOODS or reasonably incurred in their care pursuant to law. COMPANY further retains a lien on the GOODS for all such charges, ADVANCES and expenses in respect to any other property stored by STORE in any warehouse owned or operated by COMPANY or its subsidiaries wherever located and whenever deposited and without regard to whether or not said other property is still in storage.

SECTION 13 - WAIVER - SEVERABILITY

(a) COMPANY's failure to insist upon strict compliance with any provision of this Warehouse Receipt shall not constitute a waiver or estoppel to later demand strict compliance thereof and shall not constitute a waiver or estoppel to insist upon strict compliance with all other provisions of this Warehouse Receipt.

(b) In the event any portion of this Warehouse Receipt or part thereof should be declared invalid, illegal and/or unenforceable, the validity, legality and enforceability of the remaining actions and parts shall not, in any way, be affected or impaired thereby.

SECTION 14 - AUTHORITY

STORE represents and warrants that it either (i) is the lawful owner of the GOODS which are not subject to any lien or security interest of others; or (ii) is the authorized agent of the lawful owner and/or its holder of a lien or security interest and has full power and authority to enter into the agreement incorporated into this Warehouse Receipt. STORE agrees to notify all parties regarding any interest in the GOODS of the terms and conditions of this Warehouse Receipt and to obtain, as a condition of granting such an interest, the agreement of such parties to be bound by the terms and conditions of this Warehouse Receipt.

SECTION 15 - NOTICES

All written notices provided herein may be transmitted by any commercially reasonable means of communication and directed to COMPANY at the address on the front hereof and to STORE at its last known address. STORE is presumed to have knowledge of the contents of all notices transmitted in accordance with this Section within five days of transmission.

SECTION 16 - ENTIRE AGREEMENT

This agreement shall constitute the entire agreement between COMPANY and STORE relating to the GOODS and supersede all existing agreements between them whether written or oral and shall not be changed, amended or modified except by written agreement signed by representatives of COMPANY and STORE.

Revised 10/00

EXHIBIT "B"

CE Christensen & Ehret LLP
Illinois • California

222 West Adams Street
Suite 2170
Chicago, Illinois 60606
Telephone (312) 634-1014
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(312) 214-6353

July 26, 2007

VIA E-MAIL AND FAX

Ms. Linda C. Fritz
General Counsel
PLA-Art International dba San Diego Cold Storage
915 Neptune Avenue
Encinitas, California 92024
LFritz@SDCold.com
Linda@ConflictResolution.com

Re: *Marcus Foods v. San Diego Cold Storage, Inc., et al.*
Superior Court of California, County of San Diego
No. 37-200700066571-CU-CO-CTL

Dear Ms. Fritz:

We are the attorneys representing Certain Lloyds Underwriters (hereinafter "Underwriters"), subscribers to a policy of insurance referenced by certificate number LON7081-05, with a "Named Insured" identified, among others, as PLA-ART International d/b/a San Diego Cold and a policy period from January 1, 2006 to January 1, 2007 (the "Policy"). The limits of liability of \$3.5 million and a deductible of \$10,000 "per occurrence."

It is our understanding that on May 5, 2007 Marcus Foods filed the captioned complaint against defendants "San Diego Cold Storage, Inc.," its "employee" Miguel Cueva (and/or Tamayo), "self-employed salesman" Sergio Hernandez, and unknown defendants "DOE 1-100."

It is our understanding that the complaint alleges that defendants agreed, conspired, planned and engaged in the release and sale of Marcus Foods goods and food-products without the knowledge, authorization, or consent of Marcus Foods, and as a result, San Diego Cold Storage, Inc. allegedly breached its contract with Marcus Foods, and defendants allegedly converted the product for their own use.

The complaint alleges in relevant part that:

3. * * * SAN DIEGO COLD STORAGE is engaged in the business of providing warehouse and cold-storage facilities for hire, pursuant to California Commercial Code §7102(1)(h). The DEFENDANT'S SAN DIEGO COLD STORAGE facility is located at 1240 West 28th Street, in National City, California.

EXHIBIT D

Ms. Linda C. Fritz
 PLA-Art International dba San Diego Cold Storage
 July 25, 2007
 Page 2

4. * * * DEFENDANT MIGUEL CUEVA is employed by DEFENDANT SAN DIEGO COLD STORAGE as the foreman of the SAN DIEGO COLD STORAGE facility located at 1240 West 28th Street, in National City, California.
5. * * * DEFENDANT SERGIO HERNANDEZ is an independent and self-employed sales-agent engaged in the business at DEFENDANT SAN DIEGO COLD STORAGE'S facility located at 1240 West 28th Street, in National City, California.
6. PLAINTIFF does not know the true names or capacities of those DEFENDANTS named herein as DOES 1 through 100. PLAINTIFF will amend this Complaint to allege their true names and capacities when the same have been ascertained, or according to proof at the time of trial.
7. * * * fictitiously named DEFENDANT is responsible in some manner for the acts and/or occurrences alleged hereafter, and that each DEFENDANT was authorized and/or empowered by the remaining DEFENDANTS in that PLAINTIFF'S losses as herein alleged were proximately caused by their acts and/or omissions. At all time relevant herein, each DEFENDANT was the agent and/or employee of each of the other DEFENDANTS and was at all times relevant herein acting within the purpose and scope of such agency and/or employment. At all times herein below, unless otherwise specified, DEFENDANTS SAN DIEGO COLD STORAGE, MIGUEL TAMAYO, SERGIO HERNANDEZ and Does 1 through 100, inclusive, will be referred to collectively as "DEFENDANTS" in the balance of the Complaint for Damages.

* * *

STATEMENT OF FACTS

8. On or about June of 2005 PLAINTIFF MARCUS FOODS and DEFENDANT SAN DIEGO COLD STORAGE entered into a written agreement (hereinafter the "CONTRACT") wherein DEFENDANT SAN DIEGO COLD STORAGE agreed to provide PLAINTIFF MARCUS FOODS with warehouse and cold-storage facilities for hire. The CONTRACT specifically provides for the transfer of PLAINTIFF MARCUS FOODS goods and products to DEFENDANT SAN DIEGO COLD STORAGE'S warehouse for storage and release of said products only to those MARCUS FOODS customers as PLAINTIFF MARCUS FOODS would direct.

* * *

10. At the time of each PLAINTIFF'S delivery of said goods and food-products, a warehouse receipt was issued by DEFENDANT SAN DIEGO COLD STORAGE to PLAINTIFF MARCUS FOODS therefore. In return for valuable consideration paid by PLAINTIFF MARCUS FOODS,

Ms. Linda C. Fritz
PLA-Art International dba San Diego Cold Storage
July 25, 2007
Page 3

DEFENDANT SAN DIEGO COLD STORAGE accepted each of PLAINTIFF'S goods and food-products, and agreed to the storage and release of PLAINTIFF'S goods and food-products only to those MARCUS FOODS customers as PLAINTIFF MARCUS FOODS would direct.

11. In approximately February of 2006 and continuing for several months thereafter, DEFENDANTS and each of them agreed, conspired, planned and engaged in the release of and sale to third parties of PLAINTIFF'S goods and food-products without the knowledge, authorization or consent of PLAINTIFF MARCUS FOODS.
12. In approximately August 2006, PLAINTIFF MARCUS FOODS discovered the ongoing and unauthorized release of and sale to third parties of PLAINTIFF'S goods and food-products by the DEFENDANTS and each of them. The unauthorized release of PLAINTIFF'S goods and food-products by the DEFENDANTS was thereafter confirmed by DEFENDANT SAN DIEGO COLD STORAGE in August 2006.

FIRST CAUSE OF ACTION

(Breach of Contract - -Against San Diego Cold Storage)

13. PLAINTIFF MARCUS FOODS re-alleges and incorporates by reference paragraphs 1 through 12, inclusive, as though fully set forth herein.

* * *

16. PLAINTIFF MARCUS FOODS has demanded that DEFENDANT SAN DIEGO COLD STORAGE return said food products to PLAINTIFF, but DEFENDANT SAN DIEGO COLD STORAGE has failed and refused, and continues to fail and refuse to return PLAINTIFF'S goods and food-products.

* * *

SECOND CAUSE OF ACTION

(Conversion - Against All Defendants)

18. PLAINTIFF MARCUS FOODS re-alleges and incorporates by reference paragraphs 1 through 17, inclusive, as though fully set forth herein.
19. By its wrongful release of, possession of, and exercise of dominion and control over PLAINTIFF'S goods and food-products, DEFENDANTS and each of them converted the PLAINTIFF'S goods and food-products to and for their own use. The DEFENDANTS and each of them exercised possession and control of PLAINTIFF'S goods and food-products and at all relevant times therein, had the power to sell to third parties the PLAINTIFF'S goods and food-products without PLAINTIFF MARCUS FOODS' authorization or consent.

* * *

Ms. Linda C. Fritz
PLA-Art International dba San Diego Cold Storage
July 25, 2007
Page 4

WHEREFORE, PLAINTIFF MARCUS FOODS prays for judgment against DEFENDANT, and each of the, as follows:

1. Compensatory damages in an amount according to proof;
2. Consequential damages reasonably foreseeable as a result of the DEFENDANT'S ACTS AND/OR OMISSIONS.
3. Punitive Damages, as to the Second Cause of Action only, to punish and deter the DEFENDANTS from future and further actions as described therein;
4. Attorneys Fees and Costs of Suit as provided by law; and
5. For such other relief as the Court shall deem just and proper.

It is our understanding that Exhibit B of the complaint is an "Inventory of Missing Product," identifying the particular goods allegedly missing (the subject matter of the complaint) and totaling \$129,812.90.

It is our further understanding that shortly after suit was served, San Diego Cold Storage, Inc. tendered defense of the complaint to Underwriters.

Our investigation shows that the Marcus Foods goods and food-products in question are neither lost, missing, damaged, or destroyed. Rather, it is our understanding that they were released from San Diego Cold Storage, Inc.'s facility to Marcus Foods customer(s), who currently possess the product. We understand that more product were released to these customers than allegedly authorized by Marcus Foods. It is our further understanding that these goods and food-products can be retrieved from the customer(s) in possession and returned to Marcus Foods, or alternatively, that these customer(s) may be willing to pay Marcus Foods for the product.

We regret to inform you that for the reasons delineated in this letter, Underwriters must decline San Diego Cold Storage, Inc.'s tender of defense.

We draw to your attention that the Policy provides "warehouseman's legal liability coverage" as follows:

WAREHOUSEMAN'S LEGAL LIABILITY COVERAGE

A. COVERAGES

Ms. Linda C. Fritz
 PLA-Art International dba San Diego Cold Storage
 July 25, 2007
 Page 5

In consideration of premium charges hereinafter provided and subject to the following terms, conditions, exclusions, and limitations, this Company agrees:

1. a. To pay on behalf of the Insured those sums that the Insured becomes legally obligated to pay for Property Damage by reason of liability imposed upon the Insured as a warehouse operator or bailee resulting from an occurrence during the Certificate period.
2. a. We¹ may, at our discretion, investigate any occurrence and settle any claim or suit that may result, but the amount we will pay for damages, is limited as described in section C. Limits of Liability.
- b. The Company has the right and duty, to defend any suit or other proceedings which may be brought against the Insured to enforce claims, even if such suits or proceedings are groundless, false or fraudulent. But:

* * *

(4) Company has no duty to defend the Insured against any suit or other proceedings seeking damages to which this insurance policy does not apply.
- c. We will pay, irrespective of the Company's "Limit(s) of Liability" otherwise specified herein:

* * *

(2) all expenses of litigation and all costs taxed against the Insured in proceedings defended by the Company.

* * *

F. DEFINITIONS

1. The unqualified word "Insured" includes the Named Insured and also includes any executive officer, director, employee, or stockholder thereof while acting within the scope of his/her duties as such, and if the Named Insured is a partnership, the unqualified word "Insured" also includes any partner therein but only with respect to his/her liability as such. However, as respects Notice of Cancellation, it will only be necessary for this Company to send such notice to the Named Insured as stated in this Insurance.

¹ The Policy defines the words "we," "us," and "our" as Underwriters and the words "you" and "your" as the "Named Insured." The "Company" is Underwriters.

Ms. Linda C. Fritz
 PLA-Art International dba San Diego Cold Storage
 July 25, 2007
 Page 6

* * *

- 3. **"Property Damage"** means physical loss, damage or destruction to tangible, personal property owned by others in the care, custody or control of the Insured while on the Premises of the Insured and includes loss of use of such property. **Property Damage** includes the reasonable and necessary costs incurred to remove the debris of such property after an **Occurrence**. **Property Damage** includes actual loss of profits not to exceed those profits, which would have been realized from the sale of the lost, damaged or destroyed property. **Property Damage** does not include any other consequential damages including, but not limited to, personal injury, other profit losses, or damage to reputation or goodwill.
- 4. The term **"Occurrence"** wherever employed in this Insurance, is defined as (1) an accident that takes place during the period of insurance under this Certificate, or (2) in the absence thereof, a continuous or repeated exposure to conditions which unexpectedly cause loss or destruction of or damage to tangible property during the period of insurance under this Certificate, and all such exposure to substantially the same general conditions existing at or emanating from any one **Premises**² specified in the Supplemental Declarations shall be deemed one **Occurrence**.

Please be advised that Underwriters have no duty to defend the complaint because it does not allege **"Property Damage"** under the Policy; specifically, there is no *"physical loss, damage or destruction to tangible, personal property owned by others in the care, custody or control of the Insured ***."* (Emphasis added.) Here, the Marcus Foods goods and food-products in question are neither lost, missing, damaged, or destroyed. Rather, they are fully intact in Marcus Foods customer(s)' possession and may be retrieved or returned to Marcus Foods. Alternatively, these customer(s) may be willing to pay Marcus Foods for the product.

Please be further advised that Underwriters have no duty to defend the complaint because it does not allege an **"Occurrence"** under the Policy; specifically, defendants' alleged conduct neither constitutes an **"accident,"** nor a **"continuous or repeated exposure to conditions which unexpectedly cause loss ***."** Here, where the complaint alleges that defendants **"agreed, conspired, planned and engaged in the release of and sale to third parties of [Marcus Foods goods] without [its] knowledge, authorization of consent"** (emphasis added), the gist and

² The Policy defines **"Premises"** as the building located at the address shown in the Supplemental Declarations, which is occupied by the **"Insured"** as a public warehouse. Here, the Schedule of Covered Premises lists the location as 1240 West 28th Street, National City, CA 91950-6319.

Ms. Linda C. Fritz
PLA-Art International dba San Diego Cold Storage
July 25, 2007
Page 7

implication of the complaint is that defendants' alleged conduct was deliberate and calculated. Moreover, the complaint does not allege exposure to some sort of physical harm (wind, cold, mold, etc.) that results in property damage.

Underwriters also reserve rights to deny coverage to the extent that defendant "San Diego Cold Storage, Inc." is not the same entity as PLA-Art International dba San Diego Cold and therefore is not an "**Insured**" under the Policy. Underwriters also reserve rights to deny coverage to the extent that defendants Miguel Cueva (and/or Tamayo), Sergio Hernandez, and various unknown defendants "DOE 1-100" are not the insured's "employees" and, therefore, are not "**Insureds**" under the Policy.

Underwriters reserve rights to deny coverage on the basis that several exclusions under Section B of the Policy may be applicable in this case, namely, that there is no coverage:

1. For loss, destruction, or damage to property to which the **Insured** holds title or in which the **Insured** has any financial interest.
2. For liability assumed by the **Insured** under any contract or agreement, oral or written, expressed or implied, requiring the **Insured** to exercise a standard of care beyond the reasonable care standard imposed by law on the **Insured** as a public warehouse operator or bailee.
3. For loss, destruction, or damage to property to the extent that the **Insured** has been released from liability.
4. For loss, destruction, or damage to property when the damage was expected or intended by the **Insured**, regardless of whether or not the actual damage is in excess of that expected or intended.
5. For any penalties, fines, the multiplied portion of damages or judgment, government assessments, punitive and/or exemplary damages.
6. For loss, destruction, or damage to property of others in the care, custody, or control of the **Insured** while acting as a carrier for hire.
7. For loss, destruction, or damage to property caused by the infidelity or dishonesty of the **Insured** or any person or persons in the employment or service of the **Insured**, whether or not such an act or acts occur during the regular hours of employment or service.
10. For any unexplained loss of property, and/or any mysterious disappearance of property, and/or any shortage of property provided that such loss, mysterious disappearance and/or shortage is based solely upon a discrepancy between a physical count and a book, computer or other inventory.

Ms. Linda C. Fritz
 PLA-Art International dba San Diego Cold Storage
 July 25, 2007
 Page 8

12. For loss, destruction, or damage to property arising out of any processing performed by or on behalf of the Insured, unless endorsed herein. This exclusion does not apply to normal handling, freezing, and tempering.

Underwriters also reserve rights to deny coverage pursuant to the Other Insurance clauses in the Policy's Section H, Additional Conditions, Paragraph 4 and Commercial Inland Marine Conditions, Loss Conditions, Paragraph F.

Underwriters reserve rights to deny coverage pursuant to the Concealment, Misrepresentation or Fraud clauses in the Policy's Section H, Additional Conditions, Paragraph 6 and Commercial Inland Marine Conditions, General Conditions, Paragraph A.

Underwriters reserve rights to deny coverage pursuant to § 533 of the Insurance Code, which provides:

§ 533 Wilful act of insured

An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of the insured's agents or others.

Underwriters draw to your attention the Notice clauses in (1) the Policy's Section G, Loss Conditions, Paragraph 1, Duties In The Event of Accidents, Claim, or Suit, which provides:

a. The Insured, upon knowledge of a claim or of any Occurrence which may give rise to a claim, shall give written notice thereof, with the most complete information obtainable, to the Company or its authorized agent, as soon as practicable. If such Occurrence involves a violation of law, immediate notice thereof shall be given by the Insured to the public police or other peace authorities having jurisdiction. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company or its authorized agent every demand, notice, summons, or other process received by him or his representative.

and (2) Section H, Additional Conditions, Paragraph 8, Notice of Loss, which provides:

Upon the Occurrence of an event which is likely to result in a claim under this Policy, written notice shall be given to the Company or its authorized or appointed representative, Horvath & Lieber, P.C., Suite 1400, 10 South LaSalle Street, Chicago, IL, 60603, telephone number 1-800-511-7710, as soon as reasonably possible after the Insured has knowledge of the event. If suit is brought against the Insured to enforce any claim, the Insured shall make every effort to promptly forward to the Company every summons or other process that may be served upon the Insured.

Ms. Linda C. Fritz
 PLA-Art International dba San Diego Cold Storage
 July 25, 2007
 Page 9

Underwriters reserve rights to deny coverage pursuant to these Notice clauses where in this case, Marcus Foods allegedly informed San Diego Cold Storage, Inc. about the unauthorized release of goods in August 2006, but San Diego Cold Storage, Inc. waited until June 2007 (ten months later) after suit was filed to notify Underwriters of the alleged missing products.

Underwriters' coverage position is based upon the information that is currently available. Any failure to cite other policy terms, conditions, or exclusions at this time shall not preclude Underwriters from citing other policy terms, conditions, or exclusions at such time that additional information gives rise to their applicability. Underwriters expressly reserve rights to rely on those terms and conditions in deciding whether or not coverage is afforded under the Policy.

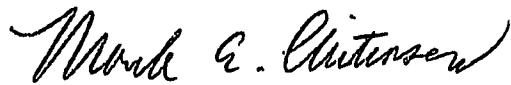
Underwriters in no way waive any rights by any statement in this letter, including their right to sue for declaratory relief with respect to this matter.

As a formality, California law requires that we advise you that if you have any objections to Underwriters' handling of a claim or disagreements with the coverage afforded by the Policy, you may contact the California Department of Insurance at the following location:

The California Department of Insurance
 Claim Services Bureau, 11th Floor
 300 South Spring Street
 Los Angeles, California 90013
 (800) 927-4357 or (213) 897-8921

Please be advised that Underwriters' investigation into coverage continues and this letter may be supplemented at a later date if and when new information comes to light or events occur. Underwriters will be happy to consider and evaluate any new information San Diego Cold Storage, Inc. chooses to provide.

Sincerely yours,



Mark E. Christensen

MEC/JCH/rmcl

cc: Mr. Edward F. Plant
 San Diego Refrigerated Services, Inc.
 P.O. Box 85001
 San Diego, California 92186-5001
efp@harborsidesd.com

Ms. Linda C. Fritz
PLA-Art International dba San Diego Cold Storage
July 25, 2007
Page 10

Ms. Connie M. Phipps
Vice President
Account Executive
Lockton Companies, LLC
444 West 47th Street, Suite 900
Kansas City, Missouri 64112-1906
CPhipps@lockton.com

Jack C. Hsu
114745

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

FILED

I. (a) PLAINTIFFS

CATLIN UNDERWRITING AGENCIES LIMITED
London, England

(b) County of Residence of First Listed Plaintiff
(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

SAN DIEGO REFRIGERATION & AIR CONDITIONING SERVICES INC.
ET AL.

CLERK, U.S. DISTRICT COURT
San Diego
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED. BY: *PLC* DEPUTY

Attorneys (If Known)

'08 CV 0173 WQH JMA

(c) Attorney's (Firm Name, Address, and Telephone Number)

Christensen & Ehret, LLP, 222 W. Adams, #2170
Chicago, IL 60606 (312) 634-1014

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF	PTF	DEF	
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input checked="" type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <input type="checkbox"/> PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Emp. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
			<input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Emp. Ret. Inc. Security Act	FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

V. ORIGIN

(Place an "X" in One Box Only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify)	<input type="checkbox"/> 6 Multidistrict Litigation	<input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment
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Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC 1332 (a)(2)

VI. CAUSE OF ACTION

Brief description of cause:
Declaratory judgment action on insurance policy

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION
UNDER F.R.C.P. 23

DEMAND \$ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

January 28, 2008

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT # 146975 AMOUNT 350

1/29/08 fm

APPLYING IPP

JUDGE

MAG. JUDGE

**UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

146975 - SR

**January 29, 2008
15:45:09**

Civ Fil Non-Pris
USAO #: 08CV0173 CIV. FIL.
Judge.: WILLIAM Q HAYES
Amount.: \$350.00 CK
Check#: BC#4158

Total-> \$350.00

FROM: CATLIN UNDERWRITING AGENCIES
V. SD REFRIGERATED SVCS.
CIVIL FILING